Docket for 03-1027

(38)

No. 03-1027 Status: ARGUED
Title: Donald H. Rumsfeld, Secretary of Defense, Petitioner
v.
Jose Padilla and Donna R. Newman, as Next Friend of Jose Padilla
Docketed: January 20, 2004
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (03-2235, 03-2438)
Decision Date: December 18, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jan 16 2004	Petition for a writ of certiorari filed. (Response due February 19, 2004)
Jan 16 2004	Motion to expedite consideration of the petition for a writ of certiorari filed by petitioner Donald H. Rumsfeld, Secretary of Defense.
Jan 20 2004	Motion DISTRIBUTED for Conference of January 23, 2004.
Jan 23 2004	Motion to expedite consideration filed by petitioner GRANTED. A response to the petition for a writ of certiorari is to be filed with the Clerk and served upon the Solicitor General on or before 3 p.m., Wednesday, February 4, 2004
Feb 4 2004	DISTRIBUTED for Conference of February 20, 2004.
Feb 4 2004	Brief of respondent Jose Padilla and Donna R. Newman, as Next Friend of Jose Padilla in opposition filed. (Distributed)
Feb 11 2004	Reply of petitioner Donald H. Rumsfeld, Secretary of Defense filed. (Distributed)
Feb 13 2004	Supplemental brief of respondent Jose Padilla and Donna R. Newman, as Next Friend of Jose Padilla filed. (Distributed)
Feb 20 2004	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 17, 2004. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 12, 2004. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, April 21, 2004. .
Mar 2 2004	SET FOR ARGUMENT WEDNESDAY, APRIL 28, 2004.
Mar 16 2004	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Mar 16 2004	Record received from the U.S.C.A. 2nd Circuit and U.S.D.C., Southern District of New York. (2 boxes)
Mar 17 2004	Joint appendix filed.
Mar 17 2004	Brief of petitioner Donald H. Rumsfeld, Secretary of Defense filed.
Mar 17 2004	Brief amicus curiae of Virginia filed.
Mar 17 2004	Brief amicus curiae of American Center for Law & Justice filed.
Mar 17 2004	Brief amici curiae of Washington Legal Foundation, et al. filed.
Mar 17 2004	Brief amici curiae of John Cornyn and Larry E. Craig filed. VIDED.
Mar 23 2004	CIRCULATED.
Apr 2 2004	Brief amici curiae of International Law Professors filed. (Distributed)
Apr 9 2004	Brief amici curiae of Professors of Constitutional Law, et al. filed. (Distributed)
Apr 9 2004	Brief amici curiae of Shirley Hufstedler, et al. filed. (Distributed)
Apr 9 2004	Brief amici curiae of Legal and Religious Organizations, Beverly Hills Bar Association, et al. filed. (Distributed)

Apr 9 2004	Brief amici curiae of Law Professors with a Particular Interest in Habeas Corpus Law filed. (Distributed)
Apr 9 2004	Brief amici curiae of Practitioners and Specialists in the International Law of War filed. (Distributed)
Apr 9 2004	Brief amici curiae of Others Are Us and Jonathan D. Wallace filed. (Distributed)
Apr 9 2004	Brief amici curiae of Original Congressional Sponsors of 18 U.S.C. 4001(A) filed. (Distributed)
Apr 9 2004	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Apr 9 2004	Brief amicus curiae of Cato Institute filed. (Distributed)
Apr 9 2004	Brief amicus curiae of Law Professors Susan Akram, et al. filed. (Distributed)
Apr 10 2004	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. (Distributed)
Apr 10 2004	Brief amici curiae of Fred Korematsu. et al. filed. (Distributed)
Apr 12 2004	Brief amici curiae of Janet Reno, et al. filed. (Distributed)
Apr 12 2004	Brief amici curiae of The Rutherford Institute et al. filed. (Distributed)
Apr 12 2004	Brief amici curiae of Louis Henkin, Harold Hongju Koh, and Michael H. Posner filed. (Distributed)
Apr 12 2004	Brief of respondents Jose Padilla and Donna R. Newman, as Next Friend of Jose Padilla filed. (Distributed)
Apr 12 2004	Brief amici curiae of Comparative Law Scholars and Experts on the Law of the United Kingdom and Israel filed. (Distributed)
Apr 12 2004	Brief amicus curiae of Global Rights filed. (Distributed)
Apr 12 2004	Brief amici curiae of Center for National Security Studies and the Constitution Project filed. (Distributed)
Apr 12 2004	Brief amici curiae of Association of the Bar of the City of New York, et al. filed. (Distributed)
Apr 12 2004	Brief amicus curiae of Law of War Experts filed. (Distributed)
Apr 12 2004	Brief amicus curiae of Public Defender Service for the District of Columbia filed. (Distributed)
Apr 12 2004	Brief amici curiae of Spartacist League and Partisan Defense Committee filed. (Distributed)
Apr 13 2004	Letter of respondent proposing a lodging.
Apr 14 2004	Motion for divided argument filed by respondent.
Apr 16 2004	Motion for divided argument filed by respondent DENIED.
Apr 21 2004	Sealed affidavit of Joe Ennis lodged with permission of the Clerk. (Distributed).
Apr 21 2004	Reply of petitioner Donald H. Rumsfeld, Secretary of Defense filed. (Distributed)
Apr 28 2004	Argued. For petitioner: Paul D. Clement, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondents: Jennifer Martinez, Stanford, Cal.

Supreme Court, U.S.
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No. 03-1027

In the Supreme Court of the United States

DONALD RUMSFELD, PETITIONER

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, to seize and detain a United States citizen in the United States based on a determination by the President that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts, or whether 18 U.S.C. 4001(a) precludes that exercise of Presidential authority.

2. Whether the district court has jurisdiction over the proper respondent to the amended habeas petition.

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No.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Donald Rumsfeld, Secretary of Defense, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-75a) is not yet reported, but is available at 2003 WL 22965085.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 11, 2001, the al Qaeda terrorist network launched a massive, coordinated attack on the United States, killing approximately 3000 persons. The President, acting pursuant to his constitutional authority as Commander in

Chief, took immediate steps to prevent future attacks. Congress promptly enacted a resolution expressing its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (App., *infra*, 59a-60a). Congress emphasized that those forces "continue to pose an unusual and extraordinary threat to the national security," and that it is necessary "to protect United States citizens both at home and abroad." Congress further recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." App., *infra*, 59a-60a.

The President ordered the armed forces of the United States to Afghanistan to subdue the al Qaeda terrorist network and the Taliban regime that supported it. In the course of that military campaign, which remains ongoing, the United States—consistent with its settled historical practice in times of war—has captured and detained numerous individuals fighting for and associated with the enemy. The detention of enemy combatants serves the vital wartime objectives of preventing captured combatants from continuing to aid the enemy and of yielding critical intelligence in advancement of the war effort. The al Qaeda network remains a serious threat to the national security in the course of the continuing conflict. That threat, regrettably, is not limited to the United States' interests abroad. Rather, there is a continuing risk of future terrorist attacks against United States citizens and interests carried out—as were the attacks of September 11—by enemy combatants who infiltrate the United States.

2. On May 8, 2002, Jose Padilla flew from Pakistan to Chicago, with an intermediate stop in Switzerland. Upon his arrival in Chicago, he was arrested pursuant to a material

witness warrant issued by the United States District Court for the Southern District of New York in connection with grand jury proceedings investigating the September 11 attacks. On May 15, 2002, following Padilla's transfer to New York City, the district court appointed respondent Donna R. Newman, Esq., as Padilla's counsel. App., *infra*, 4a-5a.

On June 9, 2002, the President, invoking both his constitutional authority as Commander in Chief and Congress's Authorization for Use of Military Force, determined that Padilla "is, and at the time he entered the United States in May 2002 was, an enemy combatant." App., *infra*, 57a. The President found, in particular: that Padilla is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war"; that Padilla has "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States"; that he "possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda"; that he "represents a continuing, present and grave danger to the national security of the United States"; and that his detention as an enemy combatant "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." *Id.* at 57a-58a.

The President's determination was based on information from sources directly connected with al Qaeda that Padilla is closely associated with al Qaeda and came to the United States to advance the conduct of terrorist operations on al Qaeda's behalf. See Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy (Aug. 27, 2002) (Mobbs Declaration) (App., *infra*, 167a-

172a).[1] The information considered by the President evidenced that Padilla moved to Egypt in 1998 after his release from prison in the United States, and he subsequently became known as Abdullah Al Muhajir. Over the next three years, Padilla traveled to Pakistan, Saudi Arabia, and Afghanistan. During his time in the Middle East, Padilla was closely associated with the al Qaeda network and its leaders. *Id.* at 168a-169a.

While in Afghanistan and Pakistan in 2001 and 2002, Padilla had extended discussions with senior al Qaeda operatives concerning his conduct of terrorist operations within the United States. In Afghanistan in 2001, Padilla met with senior Usama Bin Laden lieutenant Abu Zubaydah to discuss his plans, including a plan to detonate a radiological dispersal device (or "dirty bomb") in the United States. Zubaydah directed Padilla to travel to Pakistan to receive training on the wiring of explosives, and Padilla researched explosive devices at an al Qaeda safehouse in Lahore. While in Pakistan in 2002, Padilla met on several occasions with senior al Qaeda operatives to discuss further his plans for conducting terrorist operations within the United States, including the dirty bomb plan as well as other operations involving the detonation of explosives in hotel rooms and gas stations. At the direction of al Qaeda operatives, Padilla returned to the United States in May 2002 to advance the conduct of additional al Qaeda attacks against the United States. App., *infra*, 169a-171a.

Acting on that information, the President directed the Department of Defense "to receive Mr. Padilla from the Department of Justice and to detain him as an enemy

[1] A classified version of the Mobbs Declaration providing additional detail concerning the determination that Padilla is an enemy combatant was submitted to the district court under seal and *ex parte*. The government is making arrangements with the Clerk of this Court so that the classified declaration is available for this Court's review.

combatant." App., *infra*, 58a. On June 9, 2002, upon issuance of the President's determination, the Department of Justice immediately requested the district court to vacate the material witness warrant. The district court vacated the warrant that day, and Padilla was transferred to military control and transported to the Naval Consolidated Brig, Charleston, South Carolina, for detention as an enemy combatant. *Id.* at 83a.

3. a. On June 11, 2002, Padilla's counsel, respondent Newman, filed a habeas petition in the United States District Court for the Southern District of New York challenging the legality of Padilla's detention. C.A. App. 21-25. On June 19, 2002, Ms. Newman, styling herself as Padilla's next friend, filed an amended habeas petition on Padilla's behalf. *Id.* at 26-35. The amended petition names as respondents the President, the Secretary of Defense, the Attorney General, and Commander Melanie A. Marr, commanding officer of the Naval Consolidated Brig, Charleston, South Carolina, where Padilla is being held. *Id.* at 28. The amended petition alleges that Padilla's detention violates the Fourth, Fifth, and Sixth Amendments to the Constitution, as well as the Posse Comitatus Act, 18 U.S.C. 1385. C.A. App. 32-33. As relief, the amended petition seeks, *inter alia*, Padilla's release from military confinement. *Id.* at 34.

On June 26, 2002, the government filed a motion to dismiss the amended petition for lack of jurisdiction, arguing: (i) that attorney Newman lacks standing as a next friend to file the amended petition on Padilla's behalf; and (ii) that the district court for the Southern District of New York lacks territorial jurisdiction over the only proper respondent to the amended petition—Commander Marr, Padilla's immediate custodian at the Naval Consolidated Brig, Charleston—such that the petition should have been filed in the District of South Carolina. App., *infra*, 7a, 13a. On August 27, 2002, in response to the district court's direction to address the merits,

the government filed a response to and motion to dismiss the amended petition on the merits. In connection with that motion, the government submitted the Mobbs Declaration setting forth the factual underpinnings of the President's determination that Padilla is an enemy combatant. *Id.* at 167a-172a.

b. On December 4, 2002, the district court issued an opinion and order resolving the jurisdictional claims and several of the issues on the merits. App., *infra*, 76a-166a. On the jurisdictional issues, the court first ruled that attorney Newman had a sufficient relationship with Padilla to qualify as his next friend for standing purposes. *Id.* at 91a-97a. The court next addressed whether it has jurisdiction over the proper respondent to the amended petition. The court acknowledged that, "in the usual habeas corpus case * * * courts have held consistently that the proper respondent is the warden of the prison where the prisoner is held." *Id.* at 98a. The court nevertheless held that Secretary Rumsfeld rather than Commander Marr is the proper respondent in this case, and further held that Secretary Rumsfeld is subject to the court's habeas jurisdiction pursuant to the New York long-arm statute. *Id.* at 98a-108a, 116a-117a.

On the merits, the district court agreed with the government that the settled wartime authority of the Commander in Chief to capture and detain enemy combatants is fully applicable in the circumstances of this case. *Id.* at 119a-135a. The court relied principally on *Ex parte Quirin*, 317 U.S. 1 (1942) (*Quirin*), which upheld the exercise of military jurisdiction over German saboteurs (including one presumed to be an American citizen) who were captured within the United States's borders during World War II before they could carry out plans to destroy United States war facilities.

The district court rejected Padilla's reliance on 18 U.S.C. 4001(a), which states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to

an Act of Congress." The court explained that Padilla's detention is "pursuant to an Act of Congress," because Congress's Authorization for Use of Military Force broadly supports the application of military force to prevent future acts of terrorism by al Qaeda. App., *infra*, 140a-142a. Accordingly, the court ruled, the "President * * * has both constitutional and statutory authority to exercise the powers of Commander in Chief, including the power to detain unlawful combatants, and it matters not that Padilla is a United States citizen captured on United States soil." *Id.* at 158a.

While upholding the President's legal authority to detain Padilla, the court determined that Padilla was entitled to raise a factual challenge to the determination that he is an enemy combatant. App., *infra*, 142a-144a. The court granted Padilla access to counsel pursuant to the All Writs Act, 28 U.S.C. 1651(a), in order to facilitate such a factual challenge. *Id.* at 144a-155a.

c. On January 9, 2003, the government moved for reconsideration of that part of the district court's order directing that Padilla be afforded access to counsel. App., *infra*, 8a; C.A. App. 154. The government submitted a sworn declaration of Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency (Jan. 9, 2003), which explains the significant national security concerns raised by interposing counsel into the military's efforts to obtain vital intelligence from detained enemy combatants. C.A. App. 55-63. On March 11, 2003, the district court issued an opinion and order granting reconsideration but adhering to its previous disposition. App., *infra*, 9a; C.A. App. 153-164.

d. On March 31, 2003, the government moved the district court to certify its orders for interlocutory appeal pursuant to 28 U.S.C. 1292(b). On April 9, 2003, the district court granted the government's motion. App., *infra*, 9a-10a; C.A. App. 165-168. On June 10, 2003, the court of appeals granted

the parties' application for an interlocutory appeal. *Id.* at 10a.

4. A divided panel of the court of appeals affirmed in part and reversed in part. App., *infra*, 1a-75a.

a. The court first sustained the district court's assertion of habeas jurisdiction over the amended petition. App., *infra*, 13a-26a.[2] In the court's view, although the general rule in habeas cases calls for naming the "immediate physical custodian as respondent," that rule need not apply in the case of a person "detained for reasons other than federal criminal violations." *Id.* at 15a. The court found Secretary Rumsfeld to be a proper respondent in this case based on the "unique role [he] plays in this matter." *Id.* at 20a. The court reasoned that, while Commander Marr is Padilla's immediate physical custodian, "the legal reality of control is vested with Secretary Rumsfeld" because he "could inform the President that further restraint of Padilla as an enemy combatant is no longer necessary." *Id.* at 20a.

The court rejected the government's contention that a district court's habeas jurisdiction is confined to respondents located within the district's territorial boundaries. The court determined that a district court can exercise habeas jurisdiction over any respondent subject to suit under the long-arm statute of the state in which the court sits. App., *infra*, 21a-26a. Here, the court concluded, Secretary Rumsfeld was subject to service of process under the New York long-arm statute. *Id.* at 25a.

b. On the merits, the panel majority concluded that the President lacks legal authority to detain Padilla as an enemy combatant. App., *infra*, 26a-55a. The court first addressed the scope of the President's constitutional powers as Commander in Chief, concluding that "the President lacks

[2] The court also found as a threshold matter that attorney Newman had established standing as a next friend to file the amended petition on Padilla's behalf.

inherent constitutional authority * * * to detain American citizens on American soil outside a zone of combat." *Id.* at 29a. The court rejected the district court's reliance on *Ex parte Quirin*, reasoning that *Quirin* involved congressional authorization absent in this case. *Id.* at 37a-38a. The court of appeals thus held that, "while Congress * * * may have the power to authorize the detention of United States citizens under the circumstances of Padilla's case, the President, acting alone, does not." *Id.* at 36a (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 631-632 (1952) (Douglas, J., concurring)).

The panel majority next concluded that Congress had prohibited Padilla's detention in 18 U.S.C. 4001(a). App., *infra*, 43a-55a. The court read Section 4001(a) to prohibit all detentions of United States citizens, including the wartime detention of enemy combatants, except if pursuant to specific statutory authorization. *Id.* at 43a-44a. The court rejected the conclusion of the district court that Congress's Authorization for Use of Military Force supplies a statutory basis for Padilla's detention. In the court of appeals' view, Congress's Authorization does not encompass the detention of "American citizens seized on American soil and not actively engaged in combat." *Id.* at 51a. The court likewise found that 10 U.S.C. 956(5), which authorizes the military to use appropriated funds to detain prisoners of war and persons "similar to prisoners of war," fails to support the detention of American citizens "seized off the battlefield." *Id.* at 54a.

The court therefore remanded the case to the district court with instructions to issue a writ of habeas corpus directing Padilla's release from military control within 30 days. App., *infra*, 55a. The court explained that its holding that the President lacks authority to detain Padilla "effectively moots arguments raised by both parties con-

cerning access to counsel, standard of review, and burden of proof." *Id.* at 4a n.1.[3]

c. Judge Wesley dissented from the majority's conclusion that the President lacks legal authority to detain Padilla as an enemy combatant. App., *infra*, 61a-75a. In Judge Wesley's view, "the President, as Commander in Chief, has inherent authority to thwart acts of belligerency on U.S. soil that would cause harm to U.S. citizens, and, in this case, Congress through the Joint Resolution specifically and directly authorized the President to take the actions herein contested." *Id.* at 62a.

Judge Wesley disagreed with the majority's assumptions that the Commander-in-Chief authority is confined to "zones of combat" and that the President is without power to define a "zone of combat." The majority's reasoning, Judge Wesley observed, entails the "startling conclusion" that the "President would be without any authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat *or* authorized the detention." App., *infra*, 66a. In addition, Judge Wesley explained, Congress's Authorization "was *not* limited in geographic scope" and "did not limit the President's authority to foreign theaters." *Id.* at 73a. In Judge Wesley's view, Congress "clearly recognized that the events of 9-11 signaled a war with al Qaeda that could be waged on U.S. soil." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals has issued an unprecedented decision ordering the release of an individual whom the President—acting as Commander in Chief in a time of war—has determined poses a grave danger to the national security of the United States and should be detained as an enemy

[3] The court observed, however, that "the government had ample cause to suspect Padilla of involvement in a terrorist plot." App., *infra*, 4a n.2.

combatant. The court of appeals' conclusion that the President categorically lacks the authority to detain Padilla as an enemy combatant is fundamentally at odds with this Court's decisions, *e.g.*, *Ex parte Quirin*, 317 U.S. 1 (1942), and it undermines the President's vital authority as Commander in Chief to protect the United States against additional enemy attacks launched within the Nation's borders. Those concerns are particularly acute in the current conflict, waged against an enemy that operates in secret, has executed its most horrific attacks in the United States, and plots further surreptitious and large-scale attacks on civilian targets. The court of appeals' opinion, moreover, is premised on an overly broad interpretation of 18 U.S.C. 4001(a), and on a cramped and insupportably narrow reading of Congress's Authorization for Use of Military Force. In the face of Presidential actions and a congressional authorization prompted by attacks in the United States and motivated by an intent to, *inter alia*, prevent further attacks here, the court below found unique limitations on the President's ability to protect against attacks in the United States. Because the court of appeals' decision erroneously restricts the President's authority to prevent further attacks within the Nation's borders and resolves issues of extraordinary national significance, the decision self-evidently warrants this Court's review.

In addition, the court of appeals issued its unprecedented ruling in a case that should have proceeded in a different district court in a different circuit. The settled rule under the habeas statutes holds that the proper respondent in a challenge to physical confinement is the individual with day-to-day physical control over the detainee, *i.e.*, the detainee's immediate custodian. The court of appeals nonetheless held that Secretary Rumsfeld is a proper respondent in this case, a holding irreconcilable with the decisions of a number of other courts of appeals adhering to the immediate custodian rule. The upshot of the court of appeals' opinion, moreover,

is to vest virtually *every* district court in the country with habeas jurisdiction over the amended petition. That result is directly at odds with Congress's intent in the habeas statutes to circumscribe the reach of the district courts' habeas jurisdiction. The court of appeals' erroneous jurisdictional holding thus also merits this Court's review.

A. The Court Of Appeals' Holding That The President Lacks Authority To Detain Padilla As An Enemy Combatant Incorrectly Resolves An Issue Of Extraordinary National Significance

The court of appeals' decision eliminating a core wartime judgment of the Commander in Chief is unprecedented and warrants review. The President, acting as Commander in Chief in a time of war, determined that Padilla is "closely associated with al Qaeda" and has "engaged in * * * hostile and war-like acts," that Padilla possesses intelligence that "would aid U.S. efforts to prevent attacks by al Qaeda," and that his detention as an enemy combatant "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." App., *infra*, 57a-58a. The court of appeals nonetheless ordered Padilla's release from military control, holding that the President lacks authority to order Padilla's detention as an enemy combatant. That ruling is flawed in a number of fundamental respects and self-evidently merits this Court's review.

1. The court of appeals' decision is inconsistent with this Court's opinion in *Ex parte Quirin*

In *Ex parte Quirin*, 317 U.S. at 1, this Court upheld the military detention and prosecution of a group of German saboteurs who were captured in the United States during World War II before they could carry out plans to destroy domestic war facilities. One of the captured combatants was presumed to be a United States citizen. *Id.* at 20. This Court explained that, "[f]rom the very beginning of its history," it "has recognized and applied the law of war as

including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of * * * enemy individuals." *Id.* at 27-28. Under basic principles of the laws of war, the Court held, both lawful and unlawful enemy combatants "are subject to capture and detention * * * by opposing military forces," and unlawful combatants in addition are "subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Id.* at 31.

The Court made clear that enemy combatants who are American citizens are fully subject to capture and detention by the military. As the Court explained, "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the * * * law of war." *Quirin*, 317 U.S. at 37-38; see *id.* at 31 (describing "enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property"); accord *Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957); *In re Territo*, 156 F.2d 142 (9th Cir. 1946). For that reason, the *Quirin* Court found it unnecessary to resolve definitively one saboteur's claim to citizenship. 317 U.S. at 20.

The President's determination in this case makes clear that Padilla is an enemy combatant within the meaning of this Court's opinion in *Quirin*. The President found that Padilla is "closely associated with al Qaeda" and "engaged in * * * hostile and war-like acts * * * that had the aim to cause injury to or adverse effects on the United States," and that his detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." App., *infra*, 57a-58a.

In concluding that the President lacks authority to detain Padilla as an enemy combatant, the court of appeals reasoned that "the President's Commander-in-Chief powers

do not encompass the detention of a United States citizen * * * taken into custody on United States soil outside a zone of combat." App., *infra*, 36a n.24. *Quirin*, however, likewise involved a presumed American citizen captured within the United States's borders. Moreover, the Court expressly found it insignificant that the captured saboteurs had "not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." 317 U.S. at 38. The saboteurs were captured in Chicago and New York. Accordingly, the court of appeals' opinion cannot be squared with *Quirin*.

The court of appeals asserted that, notwithstanding the "factual parallels between the *Quirin* saboteurs and Padilla," this Court's decision "to uphold military jurisdiction" in *Quirin* "rested on express congressional authorization." App., *infra*, 37a, 38a n.26. The Articles of War discussed in *Quirin* and relied on by the court of appeals below provided for trial by military commission of offenses against the laws of war. See 317 U.S. at 26-27; *id.* at 36. The relevant provisions remain fully in effect today, and are codified in the Uniform Code of Military Justice. See 10 U.S.C. 821. And although *Quirin* addressed the pre-trial detention and trial of the saboteurs by military commission pursuant to those provisions, whereas no such charges have been brought against Padilla, the Court's opinion makes clear that the President's authority over enemy combatants encompasses not just the authority to prosecute them through military commissions, but also the more commonly practiced authority to detain enemy combatants in the course of an armed conflict without charging them with specific war crimes. 317 U.S. at 30-31. As the district court explained, consequently, this case "is *a fortiori* from *Quirin*." App., *infra*, 133a.[4]

[4] Insofar as the court of appeals viewed its decision as supported by *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), the court was mistaken. Unlike the basic authority of the Commander in Chief to detain enemy combatants in wartime, *Youngstown Sheet* concerned the President's decision to seize steel mills to prevent labor disputes from slowing the production of steel. See App., *infra*, 64a (Wesley, J., dissenting) (observing that the "President's attempt to link the seizure to prosecuting the war in Korea was far too attenuated," whereas "[i]n this case the President's authority is directly tied to his responsibilities as Commander in Chief").

2. The court of appeals' opinion rests on a fundamentally flawed interpretation of 18 U.S.C. 4001(a) and Congress's Authorization for Use of Military Force

The court of appeals found that Padilla's detention as an enemy combatant is barred by 18 U.S.C. 4001(a). That conclusion lacks merit.

a. Even if Section 4001(a) encompassed the military detention of enemy combatants in wartime (but see pages 17-18, *infra*), Padilla's detention, as the district court correctly found (App., *infra*, 139a-142a), is "pursuant to an Act of Congress" within the meaning of that provision. In ordering Padilla's detention as an enemy combatant, the President specifically invoked Congress's Authorization for Use of Military Force (App., *infra*, 57a), which broadly supports the President's use of "*all* necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." 115 Stat. 224 (emphasis added). As the Fourth Circuit explained in *Hamdi*, the "'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops." *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 467 (4th Cir. 2003), cert. granted, No. 03-6696 (Jan. 9, 2004).

The court of appeals below attempted to avoid creating an open conflict with the Fourth Circuit's reading in *Hamdi* of

Congress's Authorization by concluding that the Authorization only contemplates "a power of detention * * * in the battlefield context." App., *infra*, 52a. That reading is legally and factually insupportable. Nothing in the terms of Congress's Authorization suggests a limitation to a foreign battlefield, and there is no legal basis for so narrowing Congress's broad authorization. In any event, the Authoriation was enacted in direct response to large-scale attacks against civilians that effectively turned parts of New York, Pennsylvania, and Virginia into battlefields.

Moreover, Congress specifically recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and Congress emphasized the need "to protect United States citizens *both at home and abroad.*" 115 Stat. 224 (emphasis added). And Congress acted against the backdrop of this Court's decision in *Quirin*, which made clear that the President's Commander-in-Chief authority fully applies to American citizens captured within the United States's borders whether or not they enter a zone of military operations or combat zone. Accordingly, as Judge Wesley correctly concluded in his dissent, Congress's Authorization "was *not* limited in geographic scope"; it "did not limit the President's authority to foreign theaters"; and "Congress clearly recognized that the events of 9-11 signaled a war with al Qaeda that could be waged on U.S. soil." App., *infra*, 73a.[5]

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[5] In addition, 10 U.S.C. 956(5) authorizes the expenditure of funds for "the maintenance, pay, and allowance of prisoners of war" and "other persons in the custody of the [military] whose status is determined by the Secretary to be similar to prisoners of war." As the Fourth Circuit concluded in *Hamdi*, it "is difficult if not impossible to understand how Congress could make appropriations for the detention of persons 'similar to prisoners of war' without also authorizing their detention in the first instance." 316 F.3d at 467-468. The court of appeals below suggested that Section 956(5) has no application "to American citizens seized off the battlefield." App., *infra*, 54a. But nothing in the terms of Section 956(5) suggests a distinction between capture on a traditional battlefield and capture elsewhere, and *Quirin* makes clear that the President's Commander-in-Chief authority fully applies in either context.

b. In any event, 18 U.S.C. 4001(a), properly construed, does not pertain to the wartime detention of enemy combatants. It was settled by the time of *Quirin* that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." *Quirin*, 317 U.S. at 37. Consequently, as the Fourth Circuit explained in *Hamdi*, if Congress intended for Section 4001(a) to "override this well-established precedent * * * it surely would have made its intentions explicit." 316 F.3d at 468. Section 4001(a) instead pertains to—and was intended to address—the detention of civilians, not the detention of enemy combatants in wartime.[6]

The court of appeals' contrary interpretation of Section 4001(a) rejects the constitutional-avoidance approach of the Fourth Circuit and raises serious separation-of-powers concerns. The President's determination in a time of war that an individual is an enemy combatant represents a core exercise of the Commander-in-Chief power under Article II. See *Quirin*, 317 U.S. at 28-29; *Hamdi*, 316 F.3d at 467. The canon of constitutional avoidance thus forecloses any reading of Section 4001(a) that would interfere with the President's determination that Padilla should be detained as an enemy

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[6] The legislative history relied on by the court of appeals (App., *infra*, 44a-47a) does not suggest otherwise. As the court explained, Section 4001(a) was intended to repeal the Emergency Detention Act, which had provided the Attorney General with statutory authority to detain citizens. Consistent with its placement in Title 18, Section 4001(a) was designed to repeal this unusual grant of authority to civilian officials to detain citizens. But there is no indication that Congress intended to negate the military's longstanding authority to capture and detain enemy combatants who are American citizens—indeed, there is no mention in the legislative history of this Court's decision in *Quirin*, which had specifically recognized the President's authority to detain such combatants.

combatant. See *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 466 (1989) (avoidance canon applies with special force when the "constitutional issues * * * concern the relative powers of the coordinate branches of government"). See also App., *infra*, 74a (Wesley, J., dissenting) ("[I]f, as the majority asserts, § 4001(a) is an impenetrable barrier to the President detaining a U.S. citizen who is alleged to have ties to the belligerent and who is part of a plan for belligerency on U.S. soil, then § 4001(a), in my view, is unconstitutional.").

Despite the serious separation-of-powers concerns raised by its unprecedented decision, the court below declined two obvious options for interpreting congressional acts so as to avoid those serious concerns. The court could have avoided those difficulties through *either* a straightforward interpretation of Section 4001(a) to govern only detentions by civilian authorities or through an equally straightforward interpretation of Congress's Authorization to encompass necessary steps to protect against additional attacks "at home" (115 Stat. 224). Instead, the court interpreted Section 4001(a) unduly broadly and the Authorization unduly narrowly and pronounced severe and unprecedented limits on the President's authority. That decision plainly merits this Court's review.

3. The court of appeals' ruling compromises the ability of the President to preserve the national security in a time of war

The court of appeals' decision sets aside the determination of the Commander in Chief that "it is in the interests of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant." App., *infra*, 58a. The court contemplated that Padilla would be released from military control and would be detained by civilian authorities pending the potential initiation of criminal charges against him. See *id.* at 55a-56a. The court's holding significantly undermines

the ability of the President to protect the Nation from further enemy attacks in wartime.

The detention of enemy combatants, as indicated (page 11, *supra*), not only prevents combatants from continuing to aid the enemy, but also enables the collection of vital intelligence in furtherance of the war effort. See App., *infra*, 57a-58a. The latter function is particularly critical in the context of the current conflict, waged against an enemy that eschews conventional rules of open warfare and aims to launch large-scale, surprise attacks against the civilian population.

In this case, the President not only found that Padilla's detention is "necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces," but also determined that Padilla "possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens." App., *infra*, 57a-58a. Consequently, as Judge Wesley explained in his dissenting opinion below, "Padilla was not only a threat with regard to a specific terrorist plot, but he allegedly possesses information that could assist the United States in thwarting other terrorist plots in the U.S. and abroad." *Id.* at 73a n.41 (citation omitted).

The President's decision to detain Padilla as an enemy combatant in lieu of detaining him in the criminal justice system reflects a sensitive determination at the core of the President's Article II powers concerning the best interests of the Nation in wartime. Cf. *CIA* v. *Sims*, 471 U.S. 159, 176 (1985) ("judges * * * have little or no background in the delicate business of intelligence gathering"). The court of appeals' invalidation of the President's determination should be reviewed by this Court.

4. The Court should grant the petition for a writ of certiorari in this case rather than hold the petition pending its disposition in *Hamdi*

Although both this case and *Hamdi* v. *Rumsfeld*, No. 03-6696 (cert. granted Jan. 9, 2004), broadly concern the President's authority to detain enemy combatants in the course of the current conflict, the Court should grant certiorari and schedule argument in this case as well as in *Hamdi*, rather than hold the petition pending its ultimate disposition of *Hamdi*. Both the court of appeals below and the Fourth Circuit in *Hamdi* expressed the view that the cases raise distinct questions. See, *e.g.*, App., *infra*, 27a ("our review is limited to the case of an American citizen arrested in the United States, not on a foreign battlefield"); *Hamdi*, 316 F.3d at 465 (distinguishing *Padilla*). Those asserted distinctions warrant this Court's consideration; and this case is fully ripe for the Court's review and raises distinct questions of exceptional significance concerning the President's wartime authority as Commander in Chief.[7]

Nonetheless, because the questions in the two cases overlap in certain respects, the Court may wish to schedule argument in the two cases on the same day if it grants certiorari in this case. Accordingly, the government has filed with the Court a motion for expedited consideration in this case that proposes a schedule for consideration of the petition and briefing and argument on the merits such that oral argument could be heard in the April session of this Court, when the *Hamdi* case presumably will be heard.

[7] This case also presents important issues concerning habeas jurisdiction that independently merit this Court's review. See pp. 20-28, *infra*.

B. The Court Of Appeals Erred In Concluding That The District Court Has Jurisdiction Over The Proper Respondent To The Amended Habeas Petition

The Second Circuit issued its unprecedented decision in a case that should have never proceeded in the Southern District of New York or the Second Circuit. The habeas statutes specify that the writ "shall be directed to *the person* having custody of the person detained," 28 U.S.C. 2243 (emphasis added), and also require that, in appropriate circumstances, "the person to whom the writ is directed shall * * * produce at the hearing the body of the person detained," 28 U.S.C. 2243. See also 28 U.S.C. 2242 (requiring that the petition "allege * * * the name of the person who has custody"). This Court explained long ago that "these provisions contemplate a proceeding against some person who has the *immediate custody* of the party detained, with the power to produce the body of such party before the court or judge." *Wales* v. *Whitney*, 114 U.S. 564, 574 (1885) (emphasis added).[8] In addition, the habeas statutes confine district courts to issuing the writ only "within their respective jurisdictions," 28 U.S.C. 2241(a), a restriction intended to prevent district courts from asserting jurisdiction over habeas actions brought by individuals detained beyond the district's boundaries. See *Carbo* v. *United States*, 364 U.S. 611, 617 (1961).

Those principles establish that, in a traditional habeas action challenging physical detention, jurisdiction lies in the district court with territorial jurisdiction over the detainee's immediate custodian. *E.g.*, *Monk* v. *Secretary of the Navy*,

[8] A separate aspect of the Court's decision in *Wales* concerned the circumstances in which a person is in "custody" within the meaning of the habeas laws. The Court has since expanded its understanding of the "custody" requirement. See *Hensley* v. *Municipal Court*, 411 U.S. 345, 350 n.8 (1973).

793 F.2d 364, 369 (D.C. Cir. 1986). Accordingly, the only court with jurisdiction in this case is the United States District Court for the District of South Carolina, where Padilla's immediate custodian, Commander Marr, is located. The court of appeals, however, held that Secretary Rumsfeld is a proper respondent to the amended petition, and that the district court's habeas jurisdiction extends beyond the Southern District of New York to reach Secretary Rumsfeld. The court of appeals' ruling is incorrect and cannot be reconciled with opinions of other courts of appeals.[9]

1. The court of appeals' conclusion that Secretary Rumsfeld is a proper respondent is inconsistent with decisions of other courts of appeals

a. A long line of decisions in the courts of appeals holds that the proper respondent in a habeas action is the detainee's immediate custodian—typically the warden or commanding officer of the detention facility, who has day-to-day physical control over the detainee. See, *e.g.*, *Robledo-Gonzalez* v. *Ashcroft*, 342 F.3d 667, 673 (7th Cir. 2003); *Vasquez* v. *Reno*, 233 F.3d 688, 690-691 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); *Guerra* v. *Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986); *Jones* v. *Biddle*, 131 F.2d 853, 854 (8th Cir. 1942). Of particular significance, a number of courts of appeals have rejected claims that the Attorney General can be a proper habeas respondent, holding that "the warden of the penitentiary not the Attorney General is the person who holds the prisoner in custody for habeas purposes." *Vasquez*, 233 F.3d at 693; see *Robledo-Gonzalez*, 342 F.3d at 673; *Roman* v. *Ashcroft*, 340 F.3d 314, 321-322 (6th Cir. 2003); *In re Hanserd*, 123 F.3d 922, 925 n.2 (6th Cir. 1997); *Yi* v. *Maugans*, 24 F.3d 500, 507 (3d Cir. 1994); *Sanders* v. *Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945); *Jones*, 131 F.2d at 854.

[9] Although Secretary Rumsfeld was named as a respondent in *Hamdi*, the petition also named the commanding officer of the facility where Hamdi was detained, and the petition was properly filed in the district in which that officer is located. Consequently, in *Hamdi*, unlike this case, the fact that Secretary Rumsfeld is named as a respondent has no jurisdictional significance.

The rule that the proper respondent is the detainee's immediate custodian rather than a supervisory official has also been applied in the context of military detentions. In *Monk* v. *Secretary of the Navy*, 793 F.2d at 369, the D.C. Circuit held that the proper respondent in a habeas action brought by a military prisoner was the commanding officer of the detention facility rather than the Secretary of the Navy. The court explained that the "argument that the Secretary can be considered [the] custodian for purposes of habeas corpus is no different from the claim that the Attorney General is the custodian of all federal prisoners." *Ibid.*

b. The court of appeals in this case diverged from those decisions, ruling that Secretary Rumsfeld is a proper respondent to the amended petition. The court reasoned that the immediate custodian rule is inapplicable when the petitioner is "detained for reasons other than federal criminal violations." App., *infra*, 15a. The Ninth Circuit drew the same distinction in *Armentero* v. *INS*, 340 F.3d 1058 (9th Cir. 2003), holding that the Attorney General and Secretary of Homeland Security are proper habeas respondents when aliens seek relief from detention ordered under the immigration laws. See *id.* at 1061 (concluding that there are "exceptions to the general practice of naming an immediate physical custodian as respondent, especially with regard to habeas petitions brought by persons detained for reasons other than federal criminal violations"); App., *infra*, 18a n.13 (relying on *Armentero*).[10]

[10] The Ninth Circuit, relying on *Armentero*, later upheld certification of a nationwide habeas class action on the basis that the Attorney General and Secretary of Homeland Security are custodians of all immigration

The distinction drawn by those courts between criminal and non-criminal detentions is unsound, and it has been rejected by other courts of appeals. The terms of the habeas statutes direct attention to the individual with day-to-day physical control over the detainee, without suggesting any pertinent distinction between criminal and non-criminal detentions. Accordingly, the First Circuit, in rejecting the argument that the Attorney General is a proper respondent in habeas challenges to detention under the immigration laws, explained that "there is no principled distinction between an alien held in a detention facility awaiting possible deportation and a prisoner held in a correctional facility awaiting trial or serving a sentence." *Vasquez*, 233 F.3d at 693. The Sixth Circuit likewise has applied the immediate custodian rule in the context of habeas claims challenging non-criminal detention under the immigration laws. *Roman*, 340 F.3d at 321 ("We see no reason to apply a different rule for identifying a petitioner's custodian depending on whether the petitioner is an alien or a prisoner.").

The court of appeals also grounded its departure from the immediate custodian rule in the "unique role Secretary Rumsfeld plays in this matter." App., *infra*, 20a. According to the court, "the legal reality of control is vested with Secretary Rumsfeld, since only he—not Commander Marr—could inform the President that further restraint of Padilla as an enemy combatant is no longer necessary." *Ibid.* *No* immediate custodian, however, has independent responsibility for determining the duration of a detainee's confinement. The court of appeals' focus on "legal reality of control" thus amounts to an outright rejection of the immediate custodian rule. As other courts have held, the immediate custodian is the proper respondent under the habeas laws not because of any "legal reality of control," but because of

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detainees nationwide. *Ali Ali* v. *Ashcroft*, 346 F.3d 873 (2003). The government has sought rehearing en banc in both of those cases.

his day-to-day physical control over the detainee. See, *e.g.*, *Robledo-Gonzalez*, 342 F.3d at 673 (detainee must name as respondent "the warden of the facility in which [he] was being held" rather than an official such as the Attorney General who has "power to control some aspect of the petitioner's legal process"). Accordingly, the fact that Commander Marr lacks authority unilaterally to determine the date of Padilla's release should afford no grounds for departing from the immediate custodian rule. See *Al-Marri* v. *Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003) (applying immediate custodian rule in habeas challenge brought on behalf of detained enemy combatant).

c. The court of appeals interpreted language in certain of this Court's decisions to sanction departing from the immediate custodian rule. See App., *infra*, 15a-20a (discussing *Ex parte Endo*, 323 U.S. 283 (1944), *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973), and *Strait* v. *Laird*, 406 U.S. 341 (1972)).[11] Those decisions address anomalous situations and afford no basis for avoiding the immediate custodian rule in a traditional habeas action challenging present physical confinement.[12]

Moreover, the court of appeals' reliance on those decisions underscores the disagreement among the courts of appeals. Other courts of appeals have examined precisely the same opinions and concluded that they do not support departing

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[11] In *Ahrens* v. *Clark*, 335 U.S. 188 (1948), overruled on other grounds by *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973), the Court found it unnecessary to determine whether the Attorney General was the proper habeas respondent. See 335 U.S. at 193.

[12] *Strait* involved an unattached military reservist who was not physically detained and who thus had only a "nominal custodian." 406 U.S. at 344. The petitioner in *Braden* was in the custody of two jurisdictions: he was confined in one State but sought to challenge a detainer lodged against him by another State. See 410 U.S. at 499-500. In *Endo*, the petitioner properly filed in the location of her immediate custodian but was subsequently relocated to a different jurisdiction. 323 U.S. at 306-307.

from the immediate custodian rule. See *Vasquez*, 233 F.3d at 695 (concluding that *Endo* has no application where, as here, "the petitioner file[s] for habeas relief in a jurisdiction where neither he nor his immediate custodian [is] physically located"); *id.* at 494-496 (explaining that *Strait* and *Endo* involved "highly unusual facts" and "cannot plausibly be read to * * * consign to the scrap heap the substantial body of well-reasoned authority holding that a detainee must name his immediate custodian"); *Monk*, 793 F.2d at 369 (holding that "[n]othing in *Braden* supports" deviating from the immediate custodian rule). Accordingly, the court of appeals' jurisdictional analysis is deeply flawed, in conflict with numerous appellate decisions, and merits this Court's review.

2. The court of appeals' conclusion that habeas jurisdiction is coextensive with state long-arm statutes conflicts with the terms of the habeas laws and decisions of other courts of appeals

The habeas statutes confine district courts to issuing the writ "within their respective jurisdictions," 28 U.S.C. 2241(a), a constraint intended by Congress to prevent district courts in habeas cases from reaching beyond the district's territorial boundaries. See *Carbo* v. *United States*, 364 U.S. at 617. Consequently, as the D.C. Circuit has explained, habeas "jurisdiction is proper only in the district in which the immediate * * * custodian is located." *Monk*, 793 F.2d at 369. Even if Secretary Rumsfeld were a proper respondent to the amended petition, therefore, he is located in the Eastern District of Virginia (see *id.* at 369 n.1) and is not subject to habeas jurisdiction in the Southern District of New York.

The court of appeals in this case declined to follow the rule set forth in the habeas statutes and adopted in the D.C. Circuit, holding instead that a district court's habeas jurisdiction extends far beyond the district's territorial boundaries to reach any person subject to service under the forum state's long-arm statute. App., *infra*, 21a-26a. Under the court of appeals' view that habeas jurisdiction is defined by state long-arm statutes and that Secretary Rumsfeld is a proper respondent, jurisdiction could lie in this case in virtually *every* federal district court. And while the court asserted that its ruling was limited to the facts of this case (*id.* at 20a-21a), the court's rationale in fact would sanction a comparable result in any case in which a Cabinet-level official is involved in detention decisions. That result, of broadly overlapping habeas jurisdiction among the district courts in a particular case, is incompatible with the statutory restriction confining district courts to "their respective jurisdictions." 28 U.S.C. 2241(a).

In fact, the habeas statutes otherwise make clear that only one district court has jurisdiction in any given case, providing that the "Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application * * * to *the* district court having jurisdiction to entertain it." 28 U.S.C. 2241(b) (emphasis added); see 28 U.S.C. 2242 (application "addressed to the Supreme Court, a justice thereof or a circuit judge * * * shall state the reasons for not making application to the district court of the district in which the applicant is held"). When Congress intends to vest "concurrent jurisdiction to entertain [a habeas] application" in more than one district, Congress makes its intention explicit. 28 U.S.C. 2241(d). Accordingly, the terms of the habeas statutes foreclose the court of appeals' holding that district courts have overlapping habeas jurisdiction under state long-arm laws.[13]

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[13] The court of appeals believed (App., *infra*, 22a-23a) that this Court's decisions in *Braden* and *Strait* support a district court's assertion of long-arm jurisdiction in habeas cases. Other courts of appeals have found, by contrast, that those decisions do not support the exercise of habeas

3. The court of appeals' jurisdictional approach unduly complicates the administration of habeas proceedings

The rule that jurisdiction in a habeas challenge to present, physical confinement lies in the district court with territorial jurisdiction over the immediate custodian not only follows directly from the terms of the habeas statutes, but also is straightforward and easily administered. The court of appeals' approach in this case, by contrast, would give rise to duplicative and overlapping habeas jurisdiction among the district courts.

As the First Circuit has observed, "adopting a broad conception of who qualifies as a custodian will make the litigation of habeas claims more complex, forcing courts in many cases to undertake fact-intensive analyses of venue and forum non conveniens issues." *Vasquez*, 233 F.3d at 694. The Sixth Circuit likewise has explained that "adopting a broader definition of 'custodian' would complicate and extend the duration of habeas corpus proceedings." *Roman*, 340 F.3d at 322. For that reason, and because of the disagreement among the courts of appeals on the rules for determining habeas jurisdiction, this Court should review the court of appeals' holding that jurisdiction over the amended petition properly lies in the Southern District of New York.

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jurisdiction beyond the district's territorial boundaries. See *Vasquez*, 233 F.3d at 695 n.6 (explaining that relevant passage in *Strait* "is not intended to be a rule of general application, but rather, to explain the fact-specific holding in the case itself"); *Monk*, 793 F.2d at 369 (ruling that "[n]othing in *Braden* supports" the exercise of habeas jurisdiction outside "the district in which the immediate * * * custodian is located"); *Guerra*, 786 F.2d at 417 ("The *Braden* decision in no way stands for the proposition * * * that federal courts may entertain a habeas corpus petition when the custodian is outside their territorial jurisdiction.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-2235(L), 03-2438(CON.)

JOSE PADILLA, DONNA R. NEWMAN, AS NEXT FRIEND OF JOSE PADILLA, PETITIONER-APPELLEE-CROSS-APPELLANT

v.

DONALD RUMSFELD, RESPONDENT-APPELLANT-CROSS-APPELLEE

[Dec. 18, 2003]

OPINION

Before: POOLER, B.D. PARKER and WESLEY, Circuit Judges.

POOLER and B.D. PARKER, Circuit Judges.

INTRODUCTION

This habeas corpus appeal requires us to consider a series of questions raised by Secretary of Defense Donald Rumsfeld and by Donna R. Newman, Esq., on behalf of Jose Padilla, an American citizen held by military authorities as an enemy combatant. Padilla is suspected of being associated with al Qaeda and plan-

ning terrorist attacks in this country. The questions were certified by the United States District Court for the Southern District of New York (Michael B. Mukasey, C.J.) and involve, among others: whether the Secretary of Defense is Padilla's "custodian" for habeas purposes, whether the Southern District of New York had jurisdiction over the petition, and whether the President has the authority to detain Padilla as an enemy combatant. We conclude that the Secretary of Defense is a proper respondent and that the District Court had jurisdiction. We also conclude that Padilla's detention was not authorized by Congress, and absent such authorization, the President does not have the power under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat.

As this Court sits only a short distance from where the World Trade Center once stood, we are as keenly aware as anyone of the threat al Qaeda poses to our country and of the responsibilities the President and law enforcement officials bear for protecting the nation. But presidential authority does not exist in a vacuum, and this case involves not whether those responsibilities should be aggressively pursued, but whether the President is obligated, in the circumstances presented here, to share them with Congress.

Where, as here, the President's power as Commander-in-Chief of the armed forces and the domestic rule of law intersect, we conclude that clear congressional authorization is required for detentions of American citizens on American soil because 18 U.S.C. § 4001(a) (2000) (the "Non-Detention Act") prohibits such detentions absent specific congressional authorization. Congress's Authorization for Use of Military

Force Joint Resolution, Pub.L. No. 107-40, 115 Stat. 224 (2001) ("Joint Resolution"), passed shortly after the attacks of September 11, 2001, is not such an authorization, and no exception to section 4001(a) otherwise exists. In light of this express prohibition, the government must undertake to show that Padilla's detention can nonetheless be grounded in the President's inherent constitutional powers. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-38, 72 S. Ct. 863, 96 L.Ed. 1153 (Jackson, J., concurring). We conclude that it has not made this showing. In reaching this conclusion, we do not address the detention of an American citizen seized within a zone of combat in Afghanistan, such as the court confronted in *Hamdi* v. *Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) *("Hamdi III")*. Nor do we express any opinion as to the hypothetical situation of a congressionally authorized detention of an American citizen.

Accordingly, we remand to the District Court with instructions to issue a writ of habeas corpus directing Secretary Rumsfeld to release Padilla from military custody within 30 days, at which point the government can act within its legislatively conferred authority to take further action. For example, Padilla can be transferred to the appropriate civilian authorities who can bring criminal charges against him. If appropriate, he can also be held as a material witness in connection with grand jury proceedings. *See United States* v. *Awadallah*, 349 F.3d 42 (2d Cir. 2003). Under any

scenario, Padilla will be entitled to the constitutional protections extended to other citizens.[1]

BACKGROUND

I. The Initial Detention

On May 8, 2002, Jose Padilla, an American citizen, flew on his American passport from Pakistan, via Switzerland, to Chicago's O'Hare International Airport. There he was arrested by FBI agents pursuant to a material witness warrant issued by the Chief Judge of the Southern District of New York in connection with a grand jury investigation of the terrorist attacks of September 11. Padilla carried no weapons or explosives.[2]

The agents brought Padilla to New York where he was held as a civilian material witness in the maximum security wing of the Metropolitan Correctional Center (MCC). At that point, Padilla was under the control of the Bureau of Prisons and the United States Marshal Service. Any immediate threat he posed to national security had effectively been neutralized. On May 15, 2002, he appeared before Chief Judge Mukasey, who appointed Donna R. Newman, Esq., to represent

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[1] Therefore, our holding effectively moots arguments raised by both parties concerning access to counsel, standard of review, and burden of proof.

[2] These details should not be read to suggest that Padilla is in fact innocent or that the government lacked substantial reasons to be suspicious of him. We include them because they are relevant to our analysis of the President's power to detain Padilla as an enemy combatant. As is evident from the government investigation, described below, the government had ample cause to suspect Padilla of involvement in a terrorist plot. We, of course, reach no conclusion as to Padilla's guilt or innocence.

Padilla. Newman "conferred with [Padilla] over a period of weeks in . . . an effort to end [his] confinement." *Padilla ex rel. Newman* v. *Bush*, 233 F. Supp. 2d 564, 576 (S.D.N.Y. 2002) ("*Padilla I*"). She also conferred with Padilla's relatives and with government representatives on Padilla's behalf.

On May 22, Newman moved to vacate the material witness warrant. By June 7, the motion had been submitted for decision. A conference on the motion was scheduled for June 11. However, on June 9, the government notified the court ex parte that (1) it wished to withdraw its subpoena and (2) the President had issued an Order (the "June 9 Order") designating Padilla as an enemy combatant and directing Secretary Rumsfeld to detain him. Chief Judge Mukasey vacated the warrant, and Padilla was taken into custody by Department of Defense (DOD) personnel and transported from New York to the high-security Consolidated Naval Brig in Charleston, South Carolina. At the scheduled June 11 conference, Newman, unable to secure Padilla's signature on a habeas corpus petition, nonetheless filed one on his behalf as "next friend."

For the past eighteen months, Padilla has been held in the Brig in Charleston. He has not been permitted any contact with his counsel, his family or any other non-military personnel. During this period he has been the subject of ongoing questioning regarding the al Qaeda network and its terrorist activities in an effort to obtain intelligence.

II. The Order Authorizing the Detention

In his June 9 Order, the President directed Secretary Rumsfeld to detain Padilla based on findings that Padilla was an enemy combatant who (1) was "closely

associated with al Qaeda, an international terrorist organization with which the United States is at war"; (2) had engaged in "war-like acts, including conduct in preparation for acts of international terrorism" against the United States; (3) had intelligence that could assist the United States to ward off future terrorist attacks; and (4) was a continuing threat to United States security. As authority for the detention, the President relied on "the Constitution and . . . the laws of the United States, including the [Joint Resolution]."[3]

In an unsealed declaration submitted to the District Court, Michael H. Mobbs, a special advisor to the Under Secretary of Defense for Policy (who claims no direct knowledge of Padilla's actions or of the interrogations that produced the information discussed in his declaration), set forth the information the President received before he designated Padilla as an enemy combatant. According to the declaration, Padilla was born in New York, was convicted of murder in 1983, and remained incarcerated until his eighteenth birthday. In 1991, he was convicted on a handgun charge and again sent to prison. He moved to Egypt in 1998 and traveled to several countries in the Middle East and Southwest Asia between 1999 and 2000. During this period, he was closely associated with known members and leaders of al Qaeda. While in Afghanistan in 2001, Padilla became involved with a plan to build and detonate a "dirty bomb" within the United States, and went to Pakistan to receive training on explosives from al Qaeda operatives. There he was instructed by senior al Qaeda officials to return to the United States to conduct reconnaissance and/or other attacks on

[3] The full text of the President's Order is set forth in Appendix A.

behalf of al Qaeda. He then traveled to Chicago, where he was arrested upon arrival into the United States on May 8, 2002. Notwithstanding Padilla's extensive contacts with al Qaeda members and his actions under their direction, the government does not allege that Padilla was a member of al Qaeda.

The government also offered for the District Court's review Mobbs' sealed declaration, which the District Court characterized as "identifying one or more of the sources referred to only in cryptic terms in the [unsealed] Mobbs Declaration" and "set[ting] forth objective circumstantial evidence that corroborates the factual allegations in the [unsealed] Mobbs Declaration." *Padilla I*, 233 F. Supp. 2d at 609.[4]

III. District Court Proceedings on the Habeas Petition

On June 26, 2002, the government moved to dismiss Padilla's habeas petition on the grounds that Newman lacked standing to act as Padilla's next friend, that Secretary Rumsfeld was not a proper respondent, and that, in any event, the District Court lacked personal jurisdiction over him. On the merits, the government contended that each Mobbs declaration contained sufficient evidence of Padilla's association with al Qaeda and his intention to engage in terrorist acts in this country on behalf of al Qaeda to establish the legality of holding Padilla in military custody as an enemy combatant.

[4] Prior to oral argument, we reviewed the sealed Mobbs declaration as well as a sealed declaration of Vice Admiral Lowell E. Jacoby, the Director of the Defense Intelligence Agency, which was submitted to the District Court in connection with Secretary Rumsfeld's motion for reconsideration. Nothing in the ensuing discussion or holdings relies on either of these sealed documents.

Padilla contended that the President lacked authority to detain an American citizen taken into custody in the United States. At a minimum, he sought access to counsel.

In a comprehensive and thorough opinion, the District Court determined that (1) Newman could bring the habeas petition as Padilla's next friend; (2) Secretary Rumsfeld was a proper respondent and the District Court had jurisdiction over him; (3) the Constitution and statutory law give the President authority to detain American citizens as enemy combatants; (4) Padilla was entitled to consult with counsel to pursue his habeas petition "under conditions that will minimize the likelihood that he [could] use his lawyers as unwilling intermediaries for the transmission of information to others"; (5) Padilla could present facts and argument to the court to rebut the government's showing that he was an enemy combatant; and (6) the court would "examine only whether the President had some evidence to support his finding that Padilla was an enemy combatant, and whether that evidence has been mooted by events subsequent to his detention." *Padilla I*, 233 F. Supp. 2d at 569-70 (S.D.N.Y. 2002). The court did not rely on the sealed Mobbs declaration in making its rulings. *Id.* at 610.

The District Court's order directed the parties to set conditions under which Padilla could meet with his counsel, but Secretary Rumsfeld declined to do so. Instead, more than a month after the *Padilla I* decision, the government moved for reconsideration of the portion of *Padilla I* that allowed him access to counsel, on the ground that no conditions could be set that would protect the national security. *Padilla ex rel. Newman* v. *Rumsfeld*, 243 F. Supp. 2d 42, 43-46

(S.D.N.Y. 2003) ("*Padilla II*"). Although Chief Judge Mukasey expressed doubts as to the procedural regularity of the motion, he nonetheless entertained it on the merits and denied it. *Id.* at 48-49, 57.

The government then moved for certification of the issues which it had lost. Chief Judge Mukasey certified the following questions as "involv[ing] . . . controlling question[s] of law as to which there is substantial ground for difference of opinion" and the resolution of which "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (2000); *Padilla ex rel. Newman* v. *Rumsfeld*, 256 F. Supp. 2d 218, 222-23 (S.D.N.Y. 2003) ("*Padilla III*"):

> (1) Is the Secretary of Defense, Donald Rumsfeld, a proper respondent in this case?
>
> (2) Does this court have personal jurisdiction over Secretary Rumsfeld?
>
> (3) Does the President have the authority to designate as an enemy combatant an American citizen captured within the United States, and, through the Secretary of Defense, to detain him for the duration of armed conflict with al Qaeda?
>
> (4) What burden must the government meet to detain petitioner as an enemy combatant?
>
> (5) Does petitioner have the right to present facts in support of his habeas corpus petition?
>
> (6) Was it a proper exercise of this court's discretion and its authority under the All Writs Act to direct that petitioner be afforded access to

counsel for the purpose of presenting facts in support of his petition?

Id. at 223.

On June 10, 2003, this Court granted the parties' application for an interlocutory appeal.[5]

DISCUSSION

I. Preliminary Issues

A. Next Friend Status [6]

The first of several issues in this appeal concerns attorney Newman's standing to proceed as "next friend" on Padilla's behalf. The government contends that Newman lacks standing because next friend status is restricted to counsel with a "longstanding" connection to a detainee, and that Newman's relationship with

[5] Twelve amici submitted briefs in support of Petitioner and one in support of Respondent. Almost all of these briefs have been helpful to us. We particularly appreciate the amici's care in emphasizing different issues and thus eliminating much of the redundancy that would otherwise exist. At oral argument on November 17, 2003, we requested post-argument submissions concerning the legislative history of the congressional acts urged to be dispositive of this case. These submissions were received by the Clerk's office on November 28, 2003, and by chambers on December 2, 2003.

[6] The District Court characterized its finding that Newman could act as next friend as "a ruling that I cannot imagine will be open to serious question." *Padilla III*, 256 F. Supp. 2d at 221. While the Order certifying this matter for interlocutory appeal did not certify the next friend issue, this Court "may address any issue fairly included within the certified order" because "it is the order that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205, 116 S. Ct. 619, 133 L.Ed.2d 578 (1996) (internal quotation marks and citation omitted).

Padilla is not sufficient. Newman, on the other hand, contends that the established attorney-client relationship, under which she represented Padilla after his arrival in New York, is adequate for next friend standing because the nature of the relationship, not simply its duration, controls.

Next friend standing is authorized by 28 U.S.C. § 2242 (2000), which declares that a habeas petition may be brought "by the person for whose relief it is intended *or by someone acting in his behalf*." *Id.* (emphasis added). In *Whitmore* v. *Arkansas*, 495 U.S. 149, 110 S. Ct. 1717, 109 L.Ed.2d 135 (1990), the Supreme Court noted that next friend standing "has long been an accepted basis for jurisdiction in certain circumstances," and has most often been invoked "on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves." *Id.* at 162. "A 'next friend' does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest." *Id.* at 163. A next friend "resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another." *Morgan* v. *Potter*, 157 U.S. 195, 198, 15 S. Ct. 590, 39 L.Ed. 670 (1895). The availability of next friend status is, however, subject to significant limitations:

> Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for "next friend" standing. First, a "next friend" must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action.

> Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest. The burden is on the "next friend" clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.

Whitmore, 495 U.S. at 163-64 (internal citations omitted). These "limitations on the 'next friend' doctrine are driven by the recognition that '[i]t was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends.'" *Id.* at 164 (quoting *United States ex rel. Bryant* v. *Houston*, 273 F. 915, 916 (2d Cir. 1921)).[7]

There is no dispute that Padilla is unable to file a petition on his own behalf—he is being held incommunicado. Similarly, there is no issue as to Newman's professional relationship with Padilla. As a member of the bar, she is, of course, duty-bound to represent Padilla and to protect his interests zealously and within the bounds of the law. *See* N.Y. Code Prof. Resp. DR 7-101. Newman was assigned to represent Padilla when he was first brought into the Southern District and, before his transfer to military custody, she had begun

[7] Whether a person seeking next friend status must have a "significant relationship" to the petitioner has not been resolved by this Court or by the Supreme Court. The Supreme Court merely said that "it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest." *Whitmore*, 495 U.S. at 163-64. In the ensuing discussion, we assume—without holding—that there is a significant relationship requirement for next friend status.

to advise Padilla about the legal implications of his apprehension and confinement. From May 15 to June 9, 2002, she met with him in an effort to vacate the material witness warrant and to secure his release. She filed motions on his behalf that attacked the legal basis of his confinement, met with his family and appeared in court with him. Moreover, she was perhaps the only person aware of his wishes when he was taken into custody by the DOD, and nothing in the record before us has called into question her suitability to pursue those wishes. Finally, she has continued ably to represent him and indeed she, with others, argued this appeal on his behalf. We find this relationship to be a significant one, notwithstanding its duration. We also find it one in which Newman is neither an "intruder" nor an "uninvited meddler," *Whitmore*, 495 U.S. at 164, and, consequently, we conclude that the District Court properly approved Newman as Padilla's next friend.[8]

B. Jurisdictional Issues

The government argues that because the proper respondent is Padilla's immediate custodian—Commander Melanie A. Marr, the commander of the brig in South Carolina, not Secretary Rumsfeld—the petition must be dismissed or transferred to the District of South Carolina because the Southern District of New York does not have jurisdiction. The government bases this contention on 28 U.S.C. §§ 2242 and 2243, which

[8] The facts of this case distinguish it from *Hamdi* v. *Rumsfeld*, 294 F.3d 598 (2002) ("*Hamdi I*"), and *Coalition of Clergy, Lawyers, and Professors* v. *Bush*, 310 F.3d 1153 (9th Cir. 2002), cert. denied, — U.S. ——, 123 S. Ct. 2073, 155 L.Ed.2d 1060 (2003), on which the government relies. In both of those cases, the putative next friends had *no* relationship with the petitioner. *Hamdi I*, 294 F.3d at 606-607; *Coalition of Clergy*, 310 F.3d at 1162.

require a petitioner to "allege . . . the name of the person who has custody over him," instruct that the writ "be directed to the person having custody of the person detained," and provide that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."[9] The government asserts this language "indicates . . . there is only one proper respondent to a habeas petition," Commander Marr, who is not within the jurisdiction of the Southern District of New York. *Vasquez* v. *Reno*, 233 F.3d 688, 693 (1st Cir. 2000). The government's jurisdictional argument thus raises two issues: who is the proper respondent and whether the Southern District of New York has jurisdiction over that individual.

i. Is Secretary Rumsfeld a Proper Respondent?

The government contends that in the usual habeas corpus case brought by a federal prisoner, courts have consistently held that the proper respondent is the warden of the facility, not the Attorney General. *See, e.g.*, *Sanders* v. *Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945). Similarly, it argues the proper respondent to a petition brought by a military prisoner challenging his confinement is the warden of the facility holding the soldier, not the Secretary of Defense. *See, e.g.*, *Monk* v. *Sec'y of the Navy*, 793 F.2d 364, 369 (D.C. Cir. 1986).[10] This traditional rule has been described as "a practical one based on common sense administration of justice." *Sanders*, 148 F.2d at 20. Relying on these principles, the government argues that the petition must be brought against Commander Marr, not Secretary Rumsfeld.

[9] Other courts have rejected this argument. In *Eisel* v. *Sec'y of the Army*, 477 F.2d 1251 (D.C. Cir. 1973), a case involving an inactive reservist, the court stated:

> [W]hile the statute does provide that the action shall be against the "person having custody of the person detained," it does not define "custody" or specify who the person having "custody" will be. Nowhere does the statute speak of an "immediate custodian" or intimate that an action must necessarily be instituted in the location of such an "immediate custodian," even if it were possible to grant substance to the vague concept of "immediate custodianship."

Id. at 1258 (footnotes omitted).

But this is not the usual situation. "[W]hat makes the usual case usual is that the petitioner is serving a sentence, and the list of those other than the warden who are responsible for his confinement includes only people who have played particular and discrete roles in confining him, notably the prosecuting attorney and the sentencing judge, and who no longer have a substantial and ongoing role in his continued confinement." *Padilla I*, 233 F. Supp. 2d at 579. Thus, "[t]he warden becomes the respondent of choice almost by default." *Id.*

When habeas petitions are brought by persons detained for reasons other than federal criminal violations, the Supreme Court has recognized exceptions to the general practice of naming the immediate physical custodian as respondent. "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that mis-

[10] The only exceptions involve limited circumstances where prisoners are held abroad with no domestic forum available or where the prisoner is being held at an undisclosed location. *See Demjanjuk* v. *Meese*, 784 F.2d 1114, 1115-16 (D.C. Cir. 1986).

carriages of justice within its reach are surfaced and corrected." *Harris* v. *Nelson*, 394 U.S. 286, 291, 89 S. Ct. 1082, 22 L.Ed.2d 281 (1969). Moreover, the courts "have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Lee* v. *United States*, 501 F.2d 494, 503 n.9 (8th Cir. 1974) (Webster, J., concurring) (quoting *Hensley* v. *Municipal Court*, 411 U.S. 345, 350, 93 S. Ct. 1571, 36 L.Ed.2d 294 (1973)).

Ex parte Endo, 323 U.S. 283, 65 S. Ct. 208, 89 L.Ed. 243 (1944), for example, involved a Japanese-American woman originally interned at Tulelake, California but later transferred to an internment camp in Utah. The Court held that her transfer did not destroy the California district court's jurisdiction over the habeas petition, because there were potential respondents—the Secretary of the Interior or national officials of the War Relocation Authority—still within the court's jurisdictional reach. *Id.* at 304-06. Rather than formalistically require that Endo's immediate physical custodian be designated as the respondent, the Court recognized the flexibility of the Writ and concluded that the petition could properly be directed against national-level officials who have power to "produce[]" the petitioner even though they were not the immediate custodians. *Id.* at 305. [11]

[11] Four years later in *Ahrens* v. *Clark*, 335 U.S. 188, 68 S. Ct. 1443, 92 L.Ed. 1898 (1948), the Supreme Court was again confronted with the issue. *Ahrens* involved habeas petitions brought by German immigrants detained on Ellis Island under removal orders issued by the Attorney General. The petitions named the Attorney General as sole respondent. The *Ahrens* Court determined the petitions had to be dismissed because the detainees had not filed petitions in the district court for the district in which they were confined. *Id.* at 193. In so holding, *Ahrens* left open the question of whether the Attorney General, under whose removal orders and "custody and control" the aliens were detained, could be a proper respondent to the petitions. *Id.* at 189, 193.

Similarly, in *Strait* v. *Laird*, 406 U.S. 341, 92 S. Ct. 1693, 32 L.Ed.2d 141 (1972), the Court held that Strait, a California-domiciled inactive Army reservist under the command of an Indiana-based officer, could file a habeas action against that officer in California district court.[12] Although Strait's military records were kept with his commanding officer at Fort Benjamin Harrison, Indiana, Strait was at all times domiciled in California and was never in or assigned to Indiana. When ordered to report to active duty at Fort Gordon, Georgia, he filed an application for discharge as a

[12] In between *Endo* and *Strait*, the Court also decided *Schlanger* v. *Seamans*, 401 U.S. 487, 91 S. Ct. 995, 28 L.Ed.2d 251 (1971), which addressed a habeas petition filed by a United States soldier temporarily studying at Arizona State University but under the control of military officers at Moody Air Force Base ("Moody AFB") in Georgia. Schlanger filed a petition in Arizona district court alleging his enlistment contract had been breached and his freedom was being unlawfully restricted by the military. The petition named the Secretary of the Air Force, the Commander of Moody AFB, and the Commander of ROTC on Arizona State University's campus as respondents. In reaching its conclusion that the Commander of Moody AFB was Schlanger's custodian and outside the reach of the territorial jurisdiction of the Arizona district court, the Court did not discuss whether the Secretary of the Air Force might be both within the court's jurisdiction and a proper respondent. In our opinion, by this omission and the Court's emphasis on the Commander at Moody as an essential party, *Schlanger* suggested that the proper respondent is the person who exercises the power to limit petitioner's liberty.

conscientious objector. His application was processed at Fort Ord, California and his superiors in California recommended discharge, but on review, the application was denied. Thereafter, Strait filed a petition for a writ of habeas corpus in California naming his commander in Indiana as the respondent. The Supreme Court held that jurisdiction was proper in California. It concluded that "virtually every face-to-face contact between [Strait] and the military occurred in California" at the direction of the Indiana officer. *Id.* at 344. Accordingly, the Court held that because the Indiana commander had the responsibility to decide whether to release Strait, he was an appropriate respondent despite the intervening level of military personnel that dealt with Strait directly.

Under *Strait's* "broad concept" of custodian, the appropriate focus was whether the respondent, through his agent, was responsible for Strait's detention.[13] *Strait*, however, did not calibrate the distance in the chain of command sufficient for designation as a

[13] A number of courts have embraced this approach. For example, in *Armentero* v. *INS*, 340 F.3d 1058 (9th Cir. 2003), the Ninth Circuit held that the Attorney General was the proper respondent to an immigration habeas petition, citing the necessity to base the concept of "custodian" for the purpose of habeas relief "more on the legal reality of control than the technicalities of who administers [to petitioner] on a day-to-day basis." *Id.* at 1070. Although we acknowledge the circuit split regarding the propriety of designating the Attorney General as the habeas respondent to an immigrant's petition, *e.g.*, *Vasquez* v. *Reno*, 233 F.3d 688, 696 (1st Cir. 2000) (holding that the Attorney General was not a proper respondent), as well as our own Court's reluctance to reach the question, *see Henderson* v. *INS*, 157 F.3d 106, 128 (2d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999), we are satisfied that the unique involvement of Secretary Rumsfeld distinguishes this case from the typical immigrant petition.

"custodian" for habeas purposes. Although Strait named the Secretary of Defense as a respondent in addition to Strait's Indiana commanding officer, the Court did not discuss whether the Secretary was a proper respondent. In any event, it was clear there, unlike here, that the Secretary had no direct responsibility for the denial of Strait's application for conscientious objector status.

Finally, in *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 93 S. Ct. 1123, 35 L.Ed.2d 443 (1973), Kentucky filed a detainer against Braden while he was imprisoned in Alabama on unrelated charges. The Court held that, notwithstanding his confinement in Alabama, he could file a habeas petition against Kentucky authorities in Kentucky federal district court to challenge Kentucky's alleged failure to grant him a speedy trial on that state's charges.[14] *Id.* at 500. The Court determined that 28 U.S.C. § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the *custodian* of the prisoner. The fact that "the prisoner himself [was] confined outside the court's territorial jurisdiction" was immaterial; what was dispositive was the court's jurisdiction over the "custodian." *Id.* at 495.[15] Importantly, the proper

[14] *Braden* overruled, in part, the Court's earlier decision in *Ahrens* that a habeas petition could only be filed in a court sitting within the district in which the petitioner is confined. *See supra* note 11; *see also infra* Section I.B.ii.

[15] In addition to the cases we already have cited, prisoners in other Supreme Court cases have named someone other than their immediate custodian as the respondent. *See Garlotte* v. *Fordice*, 515 U.S. 39, 42, 115 S. Ct. 1948, 132 L.Ed.2d 36 (1995) (respondent named by an incarcerated prisoner was the governor of the state and not the prison warden); *Toth* v. *Quarles*, 350 U.S. 11, 76 S. Ct. 1, 100 L.Ed. 8 (1955) (Secretary of the Air Force named as

respondent was the entity with the power to limit the petitioner's freedom: the Kentucky authorities that filed the detainer. Simply put, Braden could not seek relief from the detainer without making the Kentucky court a party to the proceeding.[16]

The unique role Secretary Rumsfeld plays in this matter leads us to conclude that he is a proper respondent. Secretary Rumsfeld was charged by the President in the June 9 Order with detaining Padilla. In following that Order, the Secretary sent DOD personnel into the Southern District of New York to take custody of Padilla. Secretary Rumsfeld, or his designees, determined that Padilla would be sent to the brig in South Carolina. Although Commander Marr is the commander of the Brig, the legal reality of control is vested with Secretary Rumsfeld, since only he—not Commander Marr—could inform the President that further restraint of Padilla as an enemy combatant is no longer necessary. In this respect, "the extraordinary and pervasive role that [Secretary Rumsfeld] played in [this] matter[ ] is virtually unique." *Henderson* v. *INS*,

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respondent by ex-service member in military custody in Korea); *Burns* v. *Wilson*, 346 U.S. 137, 73 S. Ct. 1045, 97 L.Ed. 1508 (1953) (Secretary of Defense named as respondent by service member held in military custody in Guam). Although these cases do not analyze the propriety of naming a high level official rather than an immediate physical custodian as the respondent, they certainly suggest that there is no inflexible rule that the immediate custodian is the only proper respondent.

[16] While *Braden* is clearly about the jurisdiction of the court, its resolution rests in part on determining the proper custodian/respondent. Recognizing the overlap and interrelationship of these issues, it is important to note we must first determine if Secretary Rumsfeld is a proper respondent. The jurisdictional analysis logically follows thereafter.

157 F.3d 106, 126 (2d Cir. 1998).[17] In fact, this degree of Cabinet-level involvement is unprecedented as far as we have been able to determine. Accordingly, we do not undertake to articulate a rule defining the proper respondent in a habeas case other than one involving a petitioner designated as an enemy combatant under circumstances congruent with Padilla's designation and detention. We only hold that, here, Secretary Rumsfeld is the proper respondent.

ii. Whether the Court has Jurisdiction over Secretary Rumsfeld

The government argues that even if Secretary Rumsfeld were a proper respondent, he is located in the Eastern District of Virginia beyond the District Court's habeas jurisdiction, because 28 U.S.C. § 2241(a) limits district courts to issuing writs "within their respective jurisdictions," 28 U.S.C. § 2241(a), and this means that "habeas corpus jurisdiction does not extend to officials outside the court's territorial limits." *Malone* v. *Calderon*, 165 F.3d 1234, 1237 (9th Cir. 1999). Under this analysis, long-arm jurisdiction is not applicable to habeas petitions. Newman, on the other hand, maintains that a federal district court sitting in New York has habeas jurisdiction over a non-resident "custodian"

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[17] Moreover, circumstances we foresaw in *Billiteri* v. *United States Board of Parole*, 541 F.2d 938 (2d Cir. 1978), indicate Secretary Rumsfeld is an appropriate respondent in this case. *Billiteri* held that the Board of Parole is not an appropriate respondent in habeas petitions involving prisoners seeking early parole. *Id.* at 948. Nevertheless, *Billiteri* also noted the possibility that "when *the Board itself* has caused a parolee to be detained for violation of his parole," the parole board may qualify as a custodian for habeas purposes. *Id.* (emphasis added). Here, Secretary Rumsfeld by his own actions and decisions caused Padilla to be detained.

if he can be reached under the state's process—here, New York's long-arm statute. *See* N.Y. C.P.L.R. § 302 (McKinney 2003).

The Supreme Court in *Ahrens* v. *Clark*, 335 U.S. 188, 68 S. Ct. 1443, 92 L.Ed. 1898 (1948), had construed section 2241(a)'s language of "within their respective jurisdictions" to require a habeas petitioner to be physically present within the district. *See id.* at 190. But *Braden* overruled *Ahrens* and dispensed with this requirement:

> Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Braden, 410 U.S. at 495.

Moreover, Supreme Court law predating *Braden* supports the conclusion that habeas jurisdiction requires only that the district court have personal jurisdiction over the respondent—long-arm or otherwise. In *Strait*, the Court held that the reservist located in California could bring a habeas petition in that state against his Indiana-based commanding officer, rejecting the contention that long-arm jurisdiction does not apply in the habeas context:

> Strait's commanding officer is "present" in California through the officers in the hierarchy of the

> command who processed this serviceman's application for discharge. To require him to go to Indiana where he never has been or assigned to be would entail needless expense and inconvenience.

406 U.S. at 345 (footnote omitted). The Court added:

> That such "presence" may suffice for personal jurisdiction is well settled, *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L.Ed.2d 223; *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95, and the concept is also not a novel one as regards habeas corpus jurisdiction. In *Ex parte Endo*, 323 U.S. 283, 307, 65 S. Ct. 208, 89 L.Ed. 243, we said that habeas corpus may issue "if a respondent who has custody of the prisoner is within reach of the court's process."

Id. n.2. The issue, then, is whether Secretary Rumsfeld is subject to the personal jurisdiction of the Southern District of New York. *See, e.g., United States ex rel. Sero* v. *Preiser*, 506 F.2d 1115, 1128-29 (2d Cir. 1974) (interpreting *Braden* to require only that the custodian be reachable by the state's long-arm statute).

The breadth of a federal court's personal jurisdiction is determined by the law of the state in which the district court is located. *See* Fed.R.Civ.P. 4(k)(1)(A); *United States* v. *First Nat'l Bank*, 379 U.S. 378, 381, 85 S. Ct. 528, 13 L.Ed.2d 365 (1965); *Henderson*, 157 F.3d at 123. New York's long-arm statute provides that personal jurisdiction may be asserted over any non-domiciliary if, "in person or through an agent," he "transacts any business within the state" or "commits a tortious act within the state," as long as the particular cause of action asserted is one "arising from" any of those acts.

N.Y. C.P.L.R. § 302(a)(1), (2) (McKinney 2003).[18] Its purpose was to extend the jurisdiction of New York courts over nonresidents who have "engaged in some purposeful activity [here] in connection with the matter in suit." *Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 457, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965). Section 302 is a single-act statute; jurisdiction attaches if the defendant engages in a single purposeful activity that has a substantial relationship or articulable nexus to the claim asserted. *See Parke-Bernet Galleries, Inc.* v. *Franklyn*, 26 N.Y.2d 13, 16-17, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1969); *see also Henderson*, 157 F.3d at 123. Moreover, the statute's jurisprudential gloss and its legislative history suggest that its "transacts business" clause is not restricted to commercial activity.[19] In fact, the

[18] Secretary Rumsfeld argues only that long-arm jurisdiction is inapplicable in the habeas context. He does not argue that section 302(a)(1) does not reach his activities in this state. We choose to address this issue because neither the courts of this circuit nor the New York courts have had an opportunity to examine the application of section 302(a)(1) in this unusual context.

[19] The term "transacts any business" has been held to include: engaging in active bidding on an open phone line from California, *Parke-Bernet*, 26 N.Y.2d at 19, 308 N.Y.S.2d 337, 256 N.E.2d 506; the conducting of proceedings and disciplinary hearings on membership by a private organization, *Garofano* v. *U.S. Trotting Assoc.*, 335 N.Y.S.2d 702, 705-06 (N.Y. Sup. Ct. 1974); the execution of a separation agreement, *Kochenthal* v. *Kochenthal*, 28 A.D.2d 117, 282 N.Y.S.2d 36, 38 (N.Y. App. Div. 1967); the making of a retainer for legal services, *Elman* v. *Benson*, 32 A.D.2d 422, 302 N.Y.S.2d 961, 964-65 (N.Y. App. Div. 1969); the entry into New York by non-domiciliary defendants to attend a meeting, *Parker* v. *Rogerson*, 33 A.D.2d 284, 307 N.Y.S.2d 986, 994-95 (N.Y. App. Div. 1970), appeal dismissed, 26 N.Y.2d 964, 311 N.Y.S.2d 7, 259 N.E.2d 479 (1970); and the conducting of audits, *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 367 F. Supp. 107, 121 (S.D.N.Y. 1973).

advisory committee which drafted the section decided to follow the broad, inclusive language of the Illinois long-arm statute then in effect, adopting as the criterion the "[transaction of] *any* business within the state." N.Y. C.P.L.R. § 302(a)(1); Ill. Stat. Ann., ch. 110 § 17 (Smith-Hurd 1956). Its legislative history indicates that it was designed to take advantage of the "new [jurisdictional] enclave" opened up by *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945), where the nonresident defendant has engaged in some purposeful activity in this State in connection with the suit. *See* N.Y. Advisory Comm. Rep. (N.Y. Legis. Doc., 1958, No. 13), at 39-40.[20]

We have little difficulty concluding that Secretary Rumsfeld is amenable to process under New York's long-arm statute. Although the Department of Justice ("DOJ") was responsible for bringing Padilla into the Southern District as a material witness and for detaining him at the MCC—a DOJ facility—all of the activities salient to Padilla's claim were completed or initiated by Secretary Rumsfeld or his agents in the Southern District of New York. Secretary Rumsfeld was charged by the President in the June 9 Order with

[20] Although not relevant to the resolution of this case, it is important to note that in setting forth certain bases of permitted activity for long-arm jurisdiction, section 302 does not reach the outposts of constitutionally permitted activity. *See Banco Ambrosiano, S.p.A.* v. *Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 67, 476 N.Y.S.2d 64, 464 N.E.2d 432 (1984). Thus, a situation could occur in which the necessary contacts to satisfy due process are present, but *in personam* jurisdiction is not obtained in New York because the statute does not authorize it. *See* Seigel, N.Y. Prac., § 85, at 137 (3d ed. 1999).

detaining Padilla.[21] Pursuant to that Order, the material witness warrant was withdrawn and Secretary Rumsfeld was instructed to take custody of Padilla. Secretary Rumsfeld then sent DOD personnel into the Southern District of New York to (1) remove Padilla from the MCC, (2) detain Padilla, and (3) transfer him to South Carolina. Most importantly, Padilla's status was transformed in the Southern District—he arrived in New York a material witness in a grand jury investigation related to the September 11 attacks and departed an enemy combatant. In our opinion, these purposeful contacts of Secretary Rumsfeld with the Southern District of New York, whether personal or through agents, were substantially related to the claims asserted by Padilla and are therefore sufficient to confer personal jurisdiction over the Secretary by the District Court. *See* N.Y. C.P.L.R. § 302 (McKinney 2003); *see also Longines*, 15 N.Y.2d at 457, 261 N.Y.S.2d 8, 209 N.E.2d 68.[22]

II. Power to Detain

A. Introduction

The District Court concluded, and the government maintains here, that the indefinite detention of Padilla

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[21] Although the complained of action in this case is not the signing of the June 9 Order, it is nonetheless relevant given its charge to Secretary Rumsfeld.

[22] Similarly, we believe personal jurisdiction of Secretary Rumsfeld comports with due process. *See Asahi Metal Indus. Co., Ltd.* v. *Superior Court of California*, 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987). We believe that requiring Secretary Rumsfeld to litigate this matter in the Southern District of New York imposes no significant burden upon him—and, indeed, is most convenient for the parties—especially given the fact that this case has, for the last 18 months, been actively litigated in this district.

was a proper exercise of the President's power as Commander-in-Chief. The power to detain Padilla is said to derive from the President's authority, settled by *Ex parte Quirin*, 317 U.S. 1 (1942), to detain enemy combatants in wartime—authority that is argued to encompass the detention of United States citizens seized on United States soil. This power, the court below reasoned, may be exercised without a formal declaration of war by Congress and "even if Congressional authorization were deemed necessary, the Joint Resolution, passed by both houses of Congress, . . . engages the President's full powers as Commander in Chief." *Padilla I*, 233 F. Supp. 2d at 590. Specifically, the District Court found that the Joint Resolution acted as express congressional authorization under 18 U.S.C. § 4001(a), which prohibits the detention of American citizens absent such authorization. *Id.* at 598-99. In addition, the government claims that 10 U.S.C. § 956(5), a statute that allows the military to use authorized funds for certain detentions, grants authority to detain American citizens.

These alternative arguments require us to examine the scope of the President's inherent power and, if this is found insufficient to support Padilla's detention, whether Congress has authorized such detentions of American citizens. We reemphasize, however, that our review is limited to the case of an American citizen arrested in the United States, not on a foreign battlefield or while actively engaged in armed conflict against the United States. As the Fourth Circuit recently—and accurately—noted in *Hamdi* v. *Rumsfeld*, "[t]o compare this battlefield capture [of Hamdi] to the domestic arrest in *Padilla* v. *Rumsfeld* is to compare

apples and oranges." 337 F.3d 335, 344 (4th Cir. 2003) ("*Hamdi IV*") (Wilkinson, J., concurring).

B. The *Youngstown* Analysis

Our review of the exercise by the President of war powers in the domestic sphere starts with the template the Supreme Court constructed in *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring). *Youngstown* involved the validity of President Truman's efforts during the Korean War to seize the country's steel mills on the eve of a nationwide strike by steelworkers. *Id.* at 582-85. Writing for the majority, Justice Black explained that the President's power "must stem either from an act of Congress or from the Constitution itself." *Id.* at 585. The Court held that the seizure could not be justified as a function of the President's Commander-in-Chief powers and that it had not been authorized by Congress. *Id.* at 587-88. Justice Jackson's concurrence, which provides the framework for reviewing the validity of executive action, posits three categories for evaluating the exercise of emergency powers by the President. *See, e.g., Dames & Moore* v. *Regan*, 453 U.S. 654, 668-69, 101 S. Ct. 2972, 69 L.Ed.2d 918 (1981); *Hamdi* v. *Rumsfeld*, 296 F.3d 278, 281 (4th Cir. 2002) ("*Hamdi II*").

First, when the President acts pursuant to an express or implied authorization from Congress, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). This category is exemplified by the power exercised by the President in *Quirin* and in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S. Ct. 216, 81 L.Ed. 255 (1936). Second, when the

President acts in the absence of either a congressional grant or denial of authority, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Youngstown*, 343 U.S. at 637. Finally, the third category includes those situations where the President takes measures incompatible with the express or implied will of Congress. In such cases, "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* The "[c]ourts can sustain exclusive presidential control [in this situation] only by disabling the Congress from acting upon the subject." *Id.* at 637-38.

Here, we find that the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat. We also conclude that the Non-Detention Act serves as an explicit congressional "denial of authority" within the meaning of *Youngstown*, thus placing us in *Youngstown's* third category. Finally, we conclude that because the Joint Resolution does not authorize the President to detain American citizens seized on American soil, we remain within *Youngstown's* third category.

i. Inherent Power

The government contends that the President has the inherent authority to detain those who take up arms against this country pursuant to Article II, Section 2, of the Constitution, which makes him the Commander-in-Chief, and that the exercise of these powers domestically does not require congressional authorization.

Moreover, the argument goes, it was settled by *Quirin* that the military's authority to detain enemy combatants in wartime applies to American citizens as well as to foreign combatants. There the Supreme Court explained that "universal agreement and practice" under "the law of war" holds that "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces" and "[u]nlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 30-31. Finally, since the designation of an enemy combatant bears the closest imaginable connection to the President's constitutional responsibilities, principles of judicial deference are said by the government to assume heightened significance.

We agree that great deference is afforded the President's exercise of his authority as Commander-in-Chief. *See Dep't of the Navy* v. *Egan*, 484 U.S. 518, 530, 108 S. Ct. 818, 98 L.Ed.2d 918 (1988). We also agree that whether a state of armed conflict exists against an enemy to which the laws of war apply is a political question for the President, not the courts. *See Johnson* v. *Eisentrager*, 339 U.S. 763, 789, 70 S. Ct. 936, 94 L.Ed. 1255 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); *The Prize Cases*, 67 U.S. (2 Black) 635, 670, 17 L.Ed. 459 (1862). Because we have no authority to do so, we do not address the government's underlying assumption that an undeclared war exists between al Qaeda and the United States. We have no quarrel with the

former chief of the Justice Department's Criminal Division, who said:

> For [al Qaeda] chose not to violate the law but to attack the law and its institutions directly. Their proclaimed goal, however unrealistic, was to destroy the United States. They used powerful weapons of destructive force and openly declared their willingness to employ even more powerful weapons of mass destruction if they could lay hold of them. They were as serious a threat to the national security of the United States as one could envision.

Michael Chertoff, *Law, Loyalty, and Terror: Our Legal Response to the Post-9-11 World*, Wkly. Standard, Dec. 1, 2003, at 15.

However, it is a different proposition entirely to argue that the President even in times of grave national security threats or war, whether declared or undeclared, can lay claim to any of the powers, express or implied, allocated to Congress. The deference due to the Executive in its exercise of its war powers therefore only starts the inquiry; it does not end it. Where the exercise of Commander-in-Chief powers, no matter how well intentioned, is challenged on the ground that it collides with the powers assigned by the Constitution to Congress, a fundamental role exists for the courts. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). To be sure, when Congress and the President act together in the conduct of war, "it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs." *Hirabayashi* v. *United States*, 320 U.S. 81, 93, 63 S. Ct. 1375, 87 L.Ed. 1774 (1943). But when the Executive acts, even in the conduct of war, in the face of apparent

congressional disapproval, challenges to his authority must be examined and resolved by the Article III courts. *See Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

These separation of powers concerns are heightened when the Commander-in-Chief's powers are exercised in the domestic sphere. The Supreme Court has long counseled that while the Executive should be "indulge[d] the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society," he enjoys "no such indulgence" when "it is turned inward." *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring). This is because "the federal power over external affairs [is] in origin and essential character different from that over internal affairs," and "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Curtiss-Wright*, 299 U.S. at 319, 320. But, "Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy." *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring). Thus, we do not concern ourselves with the Executive's inherent wartime power, generally, to detain enemy combatants on the battlefield. Rather, we are called on to decide whether the Constitution gives the President the power to detain an American citizen seized in this country until the war with al Qaeda ends.

The government contends that the Constitution authorizes the President to detain Padilla as an enemy

combatant as an exercise of inherent executive authority. Padilla contends that, in the absence of express congressional authorization, the President, by his June 9 Order denominating Padilla an enemy combatant, has engaged in the "lawmaking" function entrusted by the Constitution to Congress in violation of the separation of powers. In response, no argument is made that the Constitution expressly grants the President the power to name United States citizens as enemy combatants and order their detention. Rather, the government contends that the Commander-in-Chief Clause implicitly grants the President the power to detain enemy combatants domestically during times of national security crises such as the current conflict with al Qaeda. U.S. Const. art. II, § 2.

As an initial matter, we note that in its explicit vesting of powers in Articles I and II, the Constitution circumscribes and defines the respective functions of the political branches. *INS* v. *Chadha*, 462 U.S. 919, 946, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983) ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . ."). The Constitution gives Congress the full legislative powers of government and at the same time, gives the President full executive authority and responsibility to "take care" that the laws enacted are faithfully executed. U.S. Const. art I, § 1, art. II, §§ 1, 3; *Loving* v. *United States*, 517 U.S. 748, 758, 116 S. Ct. 1737, 135 L.Ed.2d 36 (1996) ("[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity"); *Field* v. *Clark*, 143 U.S. 649, 692, 12 S. Ct. 495, 36 L.Ed. 294 (1892). Thus, while the President has the obligation

to enforce laws passed by Congress, he does not have the power to legislate.

The propriety of a given branch's conduct does not turn on the labeling of activity as "legislative" or "executive." *See Mistretta* v. *United States*, 488 U.S. 361, 393, 109 S. Ct. 647, 102 L.Ed.2d 714 (1989). Legislative action depends "not on form but upon whether [it] contain[s] matter which is properly to be regarded as legislative in its character and effect." *Chadha*, 462 U.S. at 952 (internal quotation marks omitted). Thus, we must look to whether the exercise of power in question has been "subject to the carefully crafted restraints spelled out in the Constitution," *id.* at 959, to ensure that authority is exercised only by the branch to which it has been allocated. *See Youngstown*, 343 U.S. at 587-88.

The Constitution entrusts the ability to define and punish offenses against the law of nations to the Congress, not the Executive. U.S. Const. art. II, § 8, cl. 10; *United States* v. *Arjona*, 120 U.S. 479, 483, 7 S. Ct. 628, 30 L.Ed. 728 (1887). Padilla contends that the June 9 Order mandating his detention as an "enemy combatant" was not the result of congressional action defining the category of "enemy combatant." He also argues that there has been no other legislative articulation of what constitutes an "enemy combatant," what circumstances trigger the designation, or when it ends. As in *Youngstown*, Padilla maintains that "[t]he President's order does not direct that a congressional policy be executed in a manner prescribed by Congress —it directs that a presidential policy be executed in a manner prescribed by the President." *Youngstown*, 343 U.S. at 588.

The Constitution envisions grave national emergencies and contemplates significant domestic abridgements of individual liberties during such times. *See Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159-60, 83 S. Ct. 554, 9 L.Ed.2d 644 (1963). Here, the Executive lays claim to the inherent emergency powers necessary to effect such abridgements, but we agree with Padilla that the Constitution lodges these powers with Congress, not the President. *See Youngstown*, 343 U.S. at 649-50 (Jackson, J., concurring).

First, the Constitution explicitly provides for the suspension of the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. This power, however, lies only with Congress. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101, 2 L.Ed. 554 (1807). Further, determinations about the scope of the writ are for Congress. *Lonchar* v. *Thomas*, 517 U.S. 314, 323, 116 S. Ct. 1293, 134 L.Ed.2d 440 (1996).

Moreover, the Third Amendment's prohibition on the quartering of troops during times of peace reflected the Framers' deep-seated beliefs about the sanctity of the home and the need to prevent military intrusion into civilian life.[23] *See, e.g., Laird* v. *Tatum*, 408 U.S. 1, 15, 92 S. Ct. 2318, 33 L.Ed.2d 154 (1972); *Katz* v. *United States*, 389 U.S. 347, 350 n.5, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967). At the same time they understood that in times of war—of serious national crisis—military concerns prevailed and such intrusions could occur. But

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[23] The full text of the Third Amendment states: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. Const. amend. III.

significantly, decisions as to the nature and scope of these intrusions were to be made "in a manner to be prescribed by law." U.S. Const. amend. III. The only valid process for making "law" under the Constitution is, of course, via bicameral passage and presentment to the President, whose possible veto is subject to congressional override, provided in Article I, Section 7. *See Chadha*, 462 U.S. at 946-51.

The Constitution's explicit grant of the powers authorized in the Offenses Clause, the Suspension Clause, and the Third Amendment, to Congress is a powerful indication that, absent express congressional authorization, the President's Commander-in-Chief powers do not support Padilla's confinement. *See id.* at 946. The level of specificity with which the Framers allocated these domestic powers to Congress and the lack of any even near-equivalent grant of authority in Article II's catalogue of executive powers compels us to decline to read any such power into the Commander-in-Chief Clause. In sum, while Congress—otherwise acting consistently with the Constitution—may have the power to authorize the detention of United States citizens under the circumstances of Padilla's case, the President, acting alone, does not.[24] *See Youngstown*, 343 U.S. at 631-32 (Douglas, J., concurring).

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[24] The dissent misreads us to suggest that the President has no power to deal with imminent acts of belligerency on U.S. soil outside a zone of combat and absent express authorization from Congress. *See infra* at [65a-66a]. We make no such claim. As we have discussed, criminal mechanisms exist for dealing with such situations. We only hold that the President's Commander-in-Chief powers do not encompass the detention of a United States citizen as an enemy combatant taken into custody on United States soil outside a zone of combat.

The government argues that *Quirin* established the President's inherent authority to detain Padilla. In *Quirin*, the Supreme Court reviewed the habeas petitions of German soldiers captured on United States soil during World War II. All of the petitioners had lived in the United States at some point in their lives and had been trained in the German Army in the use of explosives. *See* 317 U.S. at 20-21. These soldiers, one of whom would later claim American citizenship, landed in the United States and shed their uniforms intending to engage in acts of military sabotage. They were arrested in New York and Chicago, tried by a military commission as "unlawful combatants," and sentenced to death. The Court denied the soldiers' petitions for habeas corpus, holding that the alleged American citizenship of one of the saboteurs was immaterial to its judgment: "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." *Id.* at 37. The government contends that *Quirin* conclusively establishes the President's authority to exercise military jurisdiction over American citizens.

We do not agree that *Quirin* controls. First, and most importantly, the *Quirin* Court's decision to uphold military jurisdiction rested on express congressional authorization of the use of military tribunals to try combatants who violated the laws of war. *Id.* at 26-28. Specifically, the Court found it "unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of

Congressional legislation." *Id.* at 29.[25] Accordingly, *Quirin* does not speak to whether, or to what degree, the President may impose military authority upon United States citizens domestically without clear congressional authorization. We are reluctant to read into *Quirin* a principle that the *Quirin* Court itself specifically declined to promulgate.[26]

Moreover, there are other important distinctions between *Quirin* and this case. First, when *Quirin* was decided in 1942, section 4001(a) had not yet been enacted. The *Quirin* Court consequently had no

[25] The dissent argues that *Quirin* located the President's authority to try the saboteurs before a military tribunal, in part, on his powers as Commander-in-Chief. 317 U.S. at 28. However, the Court clearly viewed the statutory basis as the primary ground for the imposition of military jurisdiction, and regarded any inherent executive authority, if indeed it existed, as secondary: "By his Order creating the present Commission [the President] has undertaken to exercise the authority conferred upon him by Congress, and also *such* authority as the Constitution itself gives the Commander in Chief . . . ." *Id.* The Court certainly did not find the President's Commander-in-Chief powers independently sufficient to authorize such military commissions. In fact, as noted above, the Court explicitly declined to reach this question.

[26] The government relies heavily on the factual parallels between the *Quirin* saboteurs and Padilla. Similar to the *Quirin* saboteurs, Padilla allegedly traveled overseas to Afghanistan and Pakistan, where he engaged in extended discussions with senior al Qaeda operatives about conducting hostile operations within the United States. Padilla is also alleged to have received explosives training and to have returned to the United States to advance prospective al Qaeda attacks against this country. We are not persuaded by these factual parallels that the President can act to place citizens in military detention absent congressional authorization because the *Quirin* Court relied on such authorization to justify the detention and military trial of the *Quirin* saboteurs, an authorization that we believe is lacking here.

occasion to consider the effects of legislation prohibiting the detention of American citizens absent statutory authorization. As a result, *Quirin* was premised on the conclusion—indisputable at the time—that the Executive's domestic projection of military authority had been authorized by Congress. Because the *Quirin* Court did not have to contend with section 4001(a), its usefulness is now sharply attenuated.

Second, the petitioners in *Quirin* admitted that they were soldiers in the armed forces of a nation against whom the United States had formally declared war. The *Quirin* Court deemed it unnecessary to consider the dispositive issue here—the boundaries of the Executive's military jurisdiction—because the *Quirin* petitioners "upon the conceded facts, were plainly within those boundaries." *Id.* at 46. Padilla makes no such concession. To the contrary, he, from all indications, intends to dispute his designation as an enemy combatant, and points to the fact that the civilian accomplices of the *Quirin* saboteurs—citizens who advanced the sabotage plots but who were not members of the German armed forces—were charged and tried as civilians in civilian courts, not as enemy combatants subject to military authority. *Haupt* v. *United States*, 330 U.S. 631, 67 S. Ct. 874, 91 L.Ed. 1145 (1947); *Cramer* v. *United States*, 325 U.S. 1, 65 S. Ct. 918, 89 L.Ed. 1441 (1945).

In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866), the government unsuccessfully attempted to prosecute before a military tribunal a citizen who, never having belonged to or received training from the Confederate Army, "conspired with bad men" to engage in acts of war and sabotage against the United States. 71 U.S. at 131. Although *Quirin* distinguished

Milligan on the ground that "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, [and] not subject to the law of war," 317 U.S. at 45, a more germane distinction rests on the different statutes involved in *Milligan* and *Quirin*. During the Civil War, Congress authorized the President to suspend the writ of habeas corpus. *Milligan*, 71 U.S. at 4. However, it also limited his power to detain indefinitely "citizens of States in which the administration of the laws had continued unimpaired in the Federal courts, who were then held, or might thereafter be held, as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war." *Id.* at 5.

This limitation was embodied in a requirement that the Executive furnish a list of such prisoners to the district and circuit courts and, upon request by a prisoner, release him if the grand jury failed to return an indictment. *Id.* The grand jury sitting when Milligan was detained failed to indict him. *Id.* at 7. The Court concluded that because "Congress could grant no . . . power" to authorize the military trial of a civilian in a state where the courts remained open and functioning, Milligan could not be tried by a military tribunal. *Id.* at 121-22. Thus, both *Quirin* and *Milligan* are consistent with the principle that primary authority for imposing military jurisdiction upon American citizens lies with Congress. Even though *Quirin* limits to a certain extent the broader holding in *Milligan* that citizens cannot be subjected to military jurisdiction while the courts continue to function, *Quirin* and *Milligan* both teach that—at a minimum—an Act of Congress is required to expand military jurisdiction.

The government's argument for the legality of Padilla's detention also relies heavily on the Fourth Circuit's decisions in *Hamdi II* and *Hamdi III*. These decisions are inapposite. The Fourth Circuit directly predicated its holdings on the undisputed fact that Hamdi was captured in a zone of active combat in Afghanistan. *Hamdi III*, 316 F.3d at 459 ("Because it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that . . . [n]o further factual inquiry is necessary or proper."). The court said:

> We have no occasion . . . to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding. We shall, in fact, go no further in this case than the specific context before us—that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country.

Hamdi III, at 465 (internal citation omitted).

The dissent also relies on *The Prize Cases*, which, like *Milligan*, arose out of the Civil War, to conclude that the President has the inherent constitutional authority to protect the nation when met with belligerency and to determine what degree of responsive force is necessary. We believe that neither the facts of *The Prize Cases* nor their holding support such a broad construction.

First, *The Prize Cases* dealt with the capture of enemy property—not the detention of persons. The Court had no occasion to address the strong constitutional arguments against deprivations of personal liberty, or the question of whether the President could infringe upon individual liberty rights through the

exercise of his wartime powers outside a zone of combat.

Second, the dissent would have us read *The Prize Cases* as resolving any question as to whether the President may detain Padilla as an enemy combatant without congressional authorization. The Court did not, however, rest its decision upholding the exercise of the President's military authority solely on his constitutional powers without regard to congressional authorization. Rather, it noted that the President's authority to "call[ ] out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government" stemmed from "the Acts of Congress of February 28th, 1795, and 3d of March, 1807." *Id.* at 668. In any event, Congress's subsequent ratification of the President's wartime orders mooted any questions of presidential authority. *Id.* at 670. Finally, the Court in *The Prize Cases* was not faced with the Non-Detention Act specifically limiting the President's authority to detain American citizens absent express congressional authorization.

Based on the text of the Constitution and the cases interpreting it, we reject the government's contention that the President has inherent constitutional power to detain Padilla under the circumstances presented here.[27] Therefore, under *Youngstown*, we must now

[27] The dissent expresses deep concerns that our holding means that the President lacks inherent authority to detain a terrorist in the face of imminent attack. The President's authority to detain such a person is not an issue raised by this case. The dissent's concerns overlook the fact that Padilla was detained by the military while a maximum security inmate at the MCC. Thus, issues concerning imminent danger simply do not arise in this case.

consider whether Congress has authorized such detentions.

ii. Congressional Acts

a. The Non-Detention Act

As we have seen, the Non-Detention Act provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). The District Court held that this language "encompasses all detentions of United States citizens." *Padilla I*, 233 F. Supp. 2d at 597.

We review this interpretation de novo. *United States* v. *Lucien*, 347 F.3d 45, 50 (2d Cir. 2003). In conducting our review, we must first examine the language of the statute and assume that its "ordinary meaning . . . accurately expresses the legislative purpose." *Id.* at 51 (internal quotation marks omitted). If the plain language is unambiguous, "judicial inquiry ends, except in 'rare and exceptional circumstances,' and legislative history is instructive only upon 'the most extraordinary showing of contrary intentions.'" *Id.* (quoting *Garcia* v. *United States*, 469 U.S. 70, 75, 105 S. Ct. 479, 83 L.Ed.2d 472 (1984)).

We read the plain language of section 4001(a) to prohibit all detentions of citizens—a conclusion first reached by the Supreme Court. *Howe* v. *Smith*, 452 U.S. 473, 479 n.3, 101 S. Ct. 2468, 69 L.Ed.2d 171 (1981) (characterizing the Non-Detention Act as "proscribing detention *of any kind* by the United States" (emphasis in original)). Not only has the government not made an extraordinary showing of contrary intentions, but the legislative history of the Non-Detention Act is fully

consistent with our reading of it. Both the sponsor of the Act and its primary opponent repeatedly confirmed that the Act applies to detentions by the President during war and other times of national crisis. The legislative history is replete with references to the detentions of American citizens of Japanese descent during World War II, detentions that were authorized both by congressional acts and by orders issued pursuant to the President's war power. This context convinces us that military detentions were intended to be covered. Finally, the legislative history indicates that Congress understood that exceptions to the Non-Detention Act must specifically authorize *detentions*.

Section 4001(a) was enacted in 1971 and originated as an amendment to legislation repealing the Emergency Detention Act of 1950, former 50 U.S.C §§ 811-26 (1970), which authorized the detention by the Attorney General during an invasion, a declared war, or "an insurrection within the United States in aid of a foreign enemy" of "each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." 50 U.S.C. §§ 812(a), 813(a) (1970). Congress referred to section 4001(a) as the Railsback amendment for its drafter, Representative Railsback. The Railsback amendment emerged from the House Judiciary Committee and was opposed by the House Internal Security Committee, which offered other alternatives.

Congressman Ichord, the chair of the House Internal Security Committee and the primary opponent of the Railsback amendment, argued that it would tie the President's hands in times of national emergency or war. He characterized the amendment as "this most

dangerous committee amendment" and as "depriv[ing] the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises." 117 Cong. Rec. H31542 (daily ed. Sept. 13, 1971). Representative Ichord's alarm stemmed from his belief that *Youngstown* "teaches that where the Congress has acted on a subject within its jurisdiction, sets forth its policy, and asserts its authority, the President might not thereafter act in a contrary manner." *Id.* at H31544; *see id.* at H31549 ("I do feel that the language of the amendment drafted by [Representative Railsback] under the Youngstown Steel case would prohibit even the picking up, at the time of a declared war, at a time of an invasion of the United States, a man whom we would have reasonable cause to believe would commit espionage or sabotage.").

No proponent of the Railsback amendment challenged Representative Ichord's interpretation. In fact, in a striking exchange between Representatives Ichord and Railsback, he ratified Representative Ichord's interpretation. Representative Ichord asked: "Does [Representative Railsback] believe that in this country today there are people who are skilled in espionage and sabotage that might pose a possible threat to this Nation in the event of a war with nations of which those people are nationals or citizens?" *Id.* at H31551. Representative Railsback responded, "Yes." *Id.* Representative Ichord then asked: "Does the gentleman believe then that if we were to become engaged in a war with the country of those nationals, that we would permit those people to run at large without apprehending them, and wait until after the sabotage is committed?" *Id.* Railsback answered:

> I think what would happen is what J. Edgar Hoover thought could have happened when he opposed the actions that were taken in 1942. He suggested the FBI would have under surveillance those people in question and those persons they had probable cause to think would commit such actions. Does the gentleman know that J. Edgar Hoover was opposed to detention camps, because be thought he had sufficient personnel to keep all these potential saboteurs under surveillance, and that they could prosecute the guilty in accordance with due process?

Id. at H31551-52. Railsback also suggested to Congress that the President could seize citizens only pursuant to an Act of Congress or during a time of martial law when the courts are not open. *Id.* at 31755.[28]

Congress's passage of the Railsback amendment by a vote of 257 to 49 after ample warning that both the sponsor of the amendment and its primary opponent believed it would limit detentions in times of war and peace alike is strong evidence that the amendment means what it says, that is that no American citizen can be detained without a congressional act authorizing the detention.

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[28] Railsback and Ichord's shared view of the scope of the Non-Detention Act was echoed by another opponent of the bill. *See, e.g., id.* at 31554 (Representative Williams stating that "I do not want to see the President's hands tied by the language of the [Railsback] proposal which would require an Act of Congress before any likely subversive or would-be saboteur could be detained"). However, another opponent of the bill and member of the Internal Security Committee argued that even with the Railsback amendment, the President could declare a national emergency and act to detain citizens using his inherent powers. *See id.* at 31547 (remarks of Representative Ashbrook). We address the President's inherent powers *supra* at Section II.B.ii.

In addition, almost every representative who spoke in favor of repeal of the Emergency Detention Act or adoption of the Railsback amendment or in opposition to other amendments, described the detention of Japanese-American citizens during World War II as the primary motivation for their positions. *See, e.g., id.* at H31537 (Rep. Railsback); *id.* at H31541 (Rep. Poff); *id.* at H31549 (Rep. Giaimo); *id.* at H31555 (Rep. Eckhardt); *id.* at H31556 (Rep. Mikva); *id.* at H31560 (Rep. Lloyd); *id.* at H31565 (Rep. Edwards); *id.* at H31568 (Rep. Wyatt); *id.* at H31571-72 (Rep. Matsunaga); *id.* at H31573 (Rep. Johnson); *id.* at H31757 (Rep. Wright); *id.* at H31760 (Rep. Holifield); *id.* at H31770-71(Rep. Hansen); *id.* at H31772-73 (Rep. Anderson); *id.* at H31779 (Reps. Drinan and Pepper). Because the World War II detentions were authorized pursuant to the President's war making powers as well as by a congressional declaration of war and by additional congressional acts, *see Endo*, 323 U.S. at 285-90, the manifest congressional concern about these detentions also suggests that section 4001(a) limits military as well as civilian detentions.

Finally, a statement by Representative Eckhardt demonstrates that Congress intended to require its express authorization before the President could detain citizens. He said: "You have got to have an act of Congress to detain, and the act of Congress *must authorize detention.*" *Id.* at H31555 (emphasis added). Based primarily on the plain language of the Non-Detention Act but also on its legislative history and the Supreme Court's interpretation, we conclude that the Act applies to all detentions and that precise and specific language authorizing the detention of American citizens is required to override its prohibition.

Despite its plain language, the government argues that section 4001(a) is intended to preclude only detentions by the Attorney General, not by the military. Its first argument is a constitutional one: to construe section 4001(a) to include military detentions would, in the government's view, risk construing it as an unconstitutional abridgement of the President's war powers. Its second argument is a statutory "placement" argument, which the government claims is supported in two ways. First, it contends that because section 4001(a) appears in a section governing the management of prisons, it does not constrain the President's war power. Second, it maintains that because section 4001(a) immediately precedes section 4001(b)(1), which vests authority to manage prisons in the Attorney General but specifically excludes military prisons from his purview, section 4001(a) must be read to exclude military detentions.

The District Court correctly declined to construe section 4001(a) to apply only to civilian detentions in order to avoid a construction of the statute that would unconstitutionally limit the President's war power. It held that the "doctrine of constitutional avoidance 'has no application in the absence of statutory ambiguity.'" *Padilla I*, 233 F. Supp. 2d at 597 (quoting *HUD* v. *Rucker*, 535 U.S. 125, 134, 122 S. Ct. 1230, 152 L.Ed.2d 258 (2002)). We agree. For the reasons discussed above, we have found that the statute is unambiguous. Moreover, this interpretation poses no risk of unconstitutionally abridging the President's war powers because, as we have also discussed above, the President, acting alone, possesses no inherent constitutional authority to detain American citizens seized within the

United States, away from a zone of combat, as enemy combatants.[29]

Nor are we persuaded by the government's statutory placement argument. No accepted canon of statutory interpretation permits "placement" to trump text, especially where, as here, the text is clear and our reading of it is fully supported by the legislative history. While we, of course, as the government argues, read statutes as a whole to determine the most likely meaning of particular provisions or terms, this principle has no application here. *Greater New York Metro. Food Council, Inc.* v. *Giuliani*, 195 F.3d 100, 105 (2d Cir. 1999). Section 4001(b)(1) was enacted many decades

[29] If the President's Commander-in-Chief powers were plenary in the context of a domestic seizure of an American citizen, the government's argument that the legislature could not constitutionally prohibit the President from detaining citizens would have some force. *Cf. Hamdi III*, 316 F.3d at 468 (stating that "§ 4001(a) functioned principally to repeal the Emergency Detention Act [which] had provided for the preventive 'apprehension and detention' of individuals *inside* the United States 'deemed likely to engage in espionage or sabotage' during 'internal security emergencies'" and that "[t]here is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen *captured on the battlefield* during wartime may be treated like the enemy combatant that he is" (quoting H. R. Rep. No. 92-116, at 2 (1971)) (emphases added)). In view of the plain language of the Act, it might have been preferable to hold that Congress could not intrude on the President's Commander-in-Chief power on the battlefield rather than to interpret the Act as the Fourth Circuit did. We do not have to reach that issue, however. As we have previously noted, Judge Wilkinson, one of the authors of *Hamdi III*, remarked in his later concurrence to the decision not to rehear *Hamdi III* en banc that "[t]o compare this battlefield capture to the domestic arrest in *Padilla* v. *Rumsfeld* is to compare apples and oranges." *Hamdi IV*, 337 F.3d at 344.

prior to the Emergency Detention Act as part of entirely different legislation. The government points to nothing suggesting the two subsections share a common origin or meaning, rather than simply a common code designation. In any event, reliance on subsection (b)(1) suggests a conclusion opposite to the one the government proposes. Subsection (b)(1) provides:

> The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended and the applicable regulations.

18 U.S.C. § 4001(b)(1). In subsection (b)(1), Congress explicitly distinguished between military and civilian jurisdiction by authorizing the Attorney General to control all prisons except military institutions. The lack of any such distinction in subsection (a) suggests that none exists and that the Non-Detention Act applies to both civilian and military detentions.

b. Specific Statutory Authorization

Since we conclude that the Non-Detention Act applies to military detentions such as Padilla's, we would need to find specific statutory authorization in order to uphold the detention. The government claims that both the Joint Resolution, which authorized the use of force against the perpetrators of the September 11 terrorist attacks, and 10 U.S.C. § 956(5), passed in 1984, which provides funding for military detentions, authorize the detention of enemy combatants. It is with respect to the Joint Resolution that we disagree with

the District Court, which held that it must be read to confer authority for Padilla's detention. It found that the "language [of the Joint Resolution] authorizes action against not only those connected to the subject organizations who are directly responsible for the September 11 attacks, but also against those who would engage in 'future acts of international Terrorism' as part of 'such . . . organizations.'" *Padilla I*, 233 F. Supp. 2d at 598-99.

We disagree with the assumption that the authority to use military force against these organizations includes the authority to detain American citizens seized on American soil and not actively engaged in combat. First, we note that the Joint Resolution contains no language authorizing detention. It provides:[30]

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Joint Resolution § 2(a).

Because the government seeks to read into the Joint Resolution authority to detain American citizens on American soil, we interpret its language in light of the principles enunciated in *Ex parte Endo*, 323 U.S. at 298-300. The *Endo* Court first recognized that "the Constitution when it committed to the Executive and to

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[30] The full text of the resolution is set forth in Appendix B.

Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully." *Id.* at 298-99. It then said: "At the same time, however, the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government. Thus it has prescribed procedural safeguards surrounding the arrest, detention and conviction of individuals." *Id.* at 299. Therefore, the Court held: "[i]n interpreting a war-time measure we must assume that [the purpose of Congress and the Executive] was to allow for the greatest possible accommodation between those liberties and the exigencies of war." *Id.* at 300. The Court added: "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was *clearly* and *unmistakably* indicated by the language they used." *Id.* (emphasis added).

The plain language of the Joint Resolution contains nothing authorizing the detention of American citizens captured on United States soil, much less the express authorization required by section 4001(a) and the "clear," "unmistakable" language required by *Endo*. While it may be possible to infer a power of detention from the Joint Resolution in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the Joint Resolution that Congress believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not

"arrayed against our troops" in the field of battle. *Hamdi III*, 316 F.3d at 467.[31]

Further, the Joint Resolution expressly provides that it is "intended to constitute specific statutory authorization within the meaning of . . . the War Powers Resolution." Joint Resolution § 2(b); 50 U.S.C. § 1541 *et seq.* The War Powers Resolution requires the President to cease military operations within 60 days unless Congress has declared war or specifically authorized the use of the armed forces. 50 U.S.C. § 1544(b). It is unlikely—indeed, inconceivable—that Congress would expressly provide in the Joint Resolution an authorization required by the War Powers Resolution but, at the same time, leave unstated and to inference something so significant and unprecedented

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[31] The debates on the Joint Resolution are at best equivocal as to the President's powers and never mention the issue of detention. Therefore, even assuming they could overcome the lack of a specific grant to the President, they do not suggest that Congress authorized the detention of United States citizens captured on United States soil. Some legislators believed the President's authority was strictly limited. *See, e.g.*, 147 Cong. Rec. H5639 (Rep. Lantos: "to bring to bear the full force of American power abroad"). Supporters of the President's power argued that it was too limited. *See, e.g., id.* at H5653 (Rep. Barr arguing that in addition to the joint resolution, Congress should declare war to "[g]ive the President the tools, the absolute flexibility he needs under international law and The Hague Convention to ferret these people out wherever they are, however he finds them, and get it done as quickly as possible"); *id.* at H5654 (Rep. Smith: "This resolution should have authorized the President to attack, apprehend, and punish terrorists whenever it is in the best interests of America to do so. Instead, the resolution limits the President to using force only against those responsible for the terrorist attacks last Tuesday. This is a significant restraint on the President's ability to root out terrorism wherever it may be found.")

as authorization to detain American citizens under the Non-Detention Act.

Next, the Secretary argues that Padilla's detention is authorized by 10 U.S.C. § 956(5), which allows the use of appropriated funds for "expenses incident to the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of [the Armed Services] pursuant to Presidential proclamation." 10 U.S.C. § 956(5). The Fourth Circuit found that section 956(5) along with the Joint Resolution sufficed to authorize Hamdi's detention. *Hamdi III*, 316 F.3d at 467-68. With respect to Section 956(5), the court said: "It is difficult if not impossible to understand how Congress could make appropriations for the detention of persons 'similar to prisoners of war' without also authorizing their detention in the first instance." *Id.*

At least with respect to American citizens seized off the battlefield, we disagree. Section 965(5) authorizes nothing beyond the expenditure of money. *Endo* unquestionably teaches that an authorization of funds devoid of language "clearly" and "unmistakably" authorizing the detention of American citizens seized here is insufficient. *See* 323 U.S. at 303 n.24 (acknowledging that Congress may ratify past actions of the Executive through appropriations acts but refusing to find in the appropriations acts at issue an intent to allow the Executive to detain a citizen indefinitely because the appropriation did not allocate funds "earmarked" for that type of detention). In light of *Endo*, the Non-Detention Act's requirement that Congress specifically authorize detentions of American citizens,

and the guarantees of the Fourth and Fifth Amendments to the Constitution, we decline to impose on section 956(5) loads it cannot bear.

CONCLUSION

In sum, we hold that (1) Donna Newman, Esq., may pursue habeas relief on behalf of Jose Padilla; (2) Secretary of Defense Rumsfeld is a proper respondent to the habeas petition and the District Court had personal jurisdiction over him; (3) in the domestic context, the President's inherent constitutional powers do not extend to the detention as an enemy combatant of an American citizen seized within the country away from a zone of combat; (4) the Non-Detention Act prohibits the detention of American citizens without express congressional authorization; and (5) neither the Joint Resolution nor 10 U.S.C. § 956(5) constitutes such authorization under section 4001(a). These conclusions are compelled by the constitutional and statutory provisions we have discussed above. The offenses Padilla is alleged to have committed are heinous crimes severely punishable under the criminal laws. Further, under those laws the Executive has the power to protect national security and the classified information upon which it depends. *See, e.g.*, 18 U.S.C. app. § 3. And if the President believes this authority to be insufficient, he can ask Congress—which has shown its responsiveness—to authorize additional powers. To reiterate, we remand to the District Court with instructions to issue a writ of habeas corpus directing the Secretary of Defense to release Padilla from military custody within 30 days. The government can transfer Padilla to appropriate civilian authorities who can bring criminal charges against him. Also, if appropriate, Padilla can be held as a material witness in connection

with grand jury proceedings. In any case, Padilla will be entitled to the constitutional protections extended to other citizens.

APPENDIX A

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources,

REDACTED

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant;

(2) Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;

(3) Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;

(4) Mr. Padilla possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on

the United States or its armed forces, other governmental personnel, or citizens;

(5) Mr. Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;

(6) it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant; and

(7) it is REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant.

Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.

APPENDIX B

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force."

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

WESLEY, Circuit Judge, concurring in part, dissenting in part.

I respectfully dissent from that aspect of the majority's opinion that concludes the President is without authority from Congress or the Constitution to order the detention and interrogation of Mr. Padilla.[32] In my view, the President as Commander in Chief has the inherent authority to thwart acts of belligerency at home or abroad that would do harm to United States citizens. But even if Mr. Padilla's status as a United States citizen on United States soil somehow changes the constitutional calculus, I cannot see how the Non-Detention Act precludes an affirmance.

Because I would affirm the thoughtful and thorough decision of Chief Judge Mukasey, a brief examination of his opinion is appropriate. After examining the President's inherent powers under the Constitution, as explained in *Amy Warwick*, 67 U.S. (2 Black) 635, 17 L.Ed. 459 (1862) ("*The Prize Cases*"), and subsequent case law, the district court held Padilla's detention is not unlawful, as the President is authorized under the Constitution to repel belligerent acts that threaten the safety of United States citizens. The court also held that the detention is authorized by Congress' Authorization for Use of Military Force, Pub.L.No.107-40, 115 Stat. 224 (2001) ("Joint Resolution"). Chief Judge Mukasey noted that 18 U.S.C. § 4001(a) did not preclude this result in that the Joint Resolution identified a specific group of belligerents.

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[32] I concur in the majority's analysis that Newman can serve as Padilla's next friend, that Secretary Rumsfeld is an appropriate respondent and that the district court had personal jurisdiction over the Secretary.

Relying on the Third Geneva Convention, the district court examined the distinction between lawful and unlawful combatants and ultimately concluded that either could be detained. *See Padilla ex rel. Newman* v. *Bush*, 233 F. Supp. 2d 564, 594-95 (S.D.N.Y. 2002). The court concluded that the President's ability to detain Padilla as an unlawful enemy combatant was not altered by Padilla's citizenship. *See id.* at 594 (citing *Ex Parte Quirin*, 317 U.S. 1, 63 S. Ct. 1, 87 L.Ed. 3 (1942)). The court distinguished *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866), by noting that the citizens in *Milligan* were neither part of, nor associated with, the armed forces of the Confederacy. *See id.* Thus, they were not enemy combatants subject to the laws of war.

Much of Chief Judge Mukasey's work is not the focus of the majority's analytical resolution of this case. I offer that not as a criticism but merely as a note of limitation. Our task here is confined to the interplay between the President's Article II responsibilities as Commander in Chief and the authority of Congress to regulate domestic activity, even in a time of war, pursuant to Article I of the Constitution.

My disagreement with the majority is two-fold. In my view, the President, as Commander in Chief, has inherent authority to thwart acts of belligerency on U.S. soil that would cause harm to U.S. citizens, and, in this case, Congress through the Joint Resolution specifically and directly authorized the President to take the actions herein contested. The majority concludes the President is without inherent authority to detain Padilla. They agree that "great deference is afforded the President's exercise of his authority as Commander-in-Chief," Maj. at [30a] (citing *Dep't of the*

Navy v. *Egan*, 484 U.S. 518, 530, 108 S. Ct. 818, 98 L.Ed.2d 918 (1988)), and concede the judiciary has no authority to determine the political question of whether the nation is at war. *Id.* They recognize that the President and Congress often work cooperatively during times of armed conflict. However, the majority contends that separation of powers concerns are heightened when the President's powers are exercised in the "domestic sphere" and that Congress, not the Executive, controls utilization of war powers when invoked as an instrument of domestic policy. Maj. at [32a].

It is true that Congress plays the primary role in domestic policy even in a time of war. Congress does have the power to define and punish offenses committed on U.S. soil, *see* U.S. CONST. art. I, § 8, cl. 10, to suspend the Writ of Habeas Corpus, *see* U.S. CONST. art. I, § 9, cl. 2, and to determine when and if soldiers are to be quartered in private homes during a time of war, *see* U.S. CONST. amend. III. But none of those powers are in question here nor does the majority cite a specific constitutional provision in which Congress is given exclusive constitutional authority to determine how our military forces will deal with the acts of a belligerent on American soil. There is no well traveled road delineating the respective constitutional powers and limitations in this regard.

The majority relies on *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L.Ed. 1153 (1952), as its analytical guide in determining the President's constitutional authority in this matter. However, this is a different case. In *Youngstown*, the Supreme Court was confronted with two opposing claims of constitutional authority. The President

argued he had the authority to seize the steel mills in question by virtue of his constitutional responsibilities as Commander in Chief and as Chief Executive. *Id.* at 582, 72 S. Ct. 863. The President contended that a steady supply of steel was necessary to sustain the war effort in Korea. *See id.* at 582-83, 72 S. Ct. 863. The steel mills argued that at its core the dispute was a labor matter—an area clearly reserved for congressional regulation. *See id.* at 582, 72 S. Ct. 863. The Court sided with the steel mills, *id.* at 589, 72 S. Ct. 863, and with good reason—the President's attempt to link the seizure to prosecuting the war in Korea was far too attenuated. In this case the President's authority is directly tied to his responsibilities as Commander in Chief.

In *The Prize Cases* the Supreme Court rejected a challenge to the President's authority to impose a blockade on the secessionist states absent a declaration of war. *See* 67 U.S. at 668, 67 U.S. 635. As I read *The Prize Cases*, it is clear that common sense and the Constitution allow the Commander in Chief to protect the nation when met with belligerency and to determine what degree of responsive force is necessary. *See id.* at 669-70, 67 U.S. 635. The President has "no power to initiate or declare a war" but "[i]f a war be made by invasion . . . , the President is not only authorized but bound to resist force by force. He . . . is bound to accept the challenge without waiting for any special legislative authority." *Id.* at 668, 67 U.S. 635. Regardless the title given the force, the President, in fulfilling his duties as Commander in Chief to suppress insurrection and to deal with belligerents aligned against the nation, is entitled to determine the appropriate response. *See id.* at 669-70, 67 U.S. 635.

In reaching this conclusion the Court noted the President's decision regarding the level of force necessary is a political not a judicial decision. *Id.* at 670, 67 U.S. 635. Thus, as courts have previously recognized, *The Prize Cases* stands "for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected." *Campbell* v. *Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring); *see also Padilla*, 233 F. Supp. 2d at 589. "[T]he authority to decide whether the exigency has arisen, belongs exclusively to the President, and . . . his decision is conclusive upon all other persons." *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 30, 6 L.Ed. 537 (1827).[33] *The Prize Cases* demonstrates that congressional authorization is not necessary for the Executive to exercise his constitutional authority to prosecute armed conflicts when, as on September 11, 2001, the United States is attacked.

My colleagues appear to agree with this premise but conclude that somehow the President has *no* power to deal with acts of a belligerent on U.S. soil "away from a zone of combat" absent express authorization from Congress. Maj. at [2a], [29a], [49a]. That would seem to imply that the President does have some war power authority to detain a citizen on U.S. soil if the "zone of combat" was the United States. The majority does not tell us who has the authority to define a "zone of combat" or to designate a geopolitical area as such.

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[33] *Quirin* spoke to the issue of Presidential authority as well. In that case, the Court found the President's decision to try the saboteurs before a military tribunal rested in part on an exercise of his Presidential authority under Article II of the Constitution. *See Quirin*, 317 U.S. at 28, 63 S. Ct. 1.

Given the majority's view that "the Constitution lodges . . . [inherent national emergency powers] with Congress, not the President," Maj. at [35a], it would seem that the majority views this responsibility as also the singular province of Congress. That produces a startling conclusion. The President would be without any authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat *or* authorized the detention. Curiously, even Mr. Padilla's attorney conceded that the President could detain a terrorist without Congressional authorization if the attack were imminent. *See* Oral Argument Tr. at 51.

But the scope of the President's inherent war powers under Article II does not end the matter, for in my view Congress clearly and specifically authorized the President's actions here.[34] As Chief Judge Mukasey noted, the Joint Resolution, passed by both houses of Congress, "authorizes the President to use necessary and appropriate force in order, among other things, 'to prevent any future acts of international terrorism against the United States,' and thereby engages the President's full powers as Commander in Chief." *Padilla*, 233 F. Supp. 2d at 590 (quoting Pub.L. No. 107-40, 115 Stat. 224); *cf. Quirin*, 317 U.S. at 29, 63 S. Ct. 1 (finding it "unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power . . . [f]or here Congress has authorized [his actions]"). *Youngstown*

[34] Of course, the majority must delineate the President's war powers as Commander in Chief; if the President acted within his inherent authority, the scope of the Joint Resolution and the proscription of § 4001(a) is irrelevant.

fully supports that view. "When the President acts pursuant to an *express* or *implied* authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 343 U.S. at 635, 72 S. Ct. 863 (Jackson, J., concurring) (emphasis added). The Joint Resolution authorized the President to take the action herein challenged; his powers were at their apogee.

Following the attacks of 9-11, the President declared a national emergency. *See* 50 U.S.C. § 1541(c)(3) (2003). On September 18, 2001, Congress passed Public Law 107-40 as a joint resolution. Pub.L. No. 107-40, 115 Stat. 224. That resolution, entitled "Authorization for Use of Military Force," notes the "acts of treacherous violence committed against the United States and its citizens," and the danger those acts posed to national security. *Id.* Moreover, the resolution recognizes "the President has authority *under the Constitution* to take action to deter and prevent acts of international terrorism against the United States." *Id.* (emphasis added). It provides:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub.L. No. 107-40, § 2(a), 115 Stat. 224, 224.[35] Some of the belligerents covered by the Joint Resolution are not nation states, they have no armies in the traditional sense—their "membership" consists of "soldiers" who rely on subterfuge and surprise. Congress recognized that these organizations are waging a war different from any our nation has faced. It authorized the President to employ the necessary and appropriate force to prevent future terrorist attacks.

It is quite clear from the President's Order of June 9, 2002 that Mr. Padilla falls within the Joint Resolution's intended sweep. Appendix A at 50-51. As relevant here, the Joint Resolution authorizes the President (1) to use appropriate and necessary force—detention would seem to be an appropriate level of force in Mr. Padilla's situation, (2) against those organizations that planned, authorized, or committed the terrorist attacks

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[35] The Joint Resolution also provides, in section 2(b)(1), that it is "intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." Pub.L. No. 107-40 § 2(b)(1), 115 Stat. 224, 224. As noted by Chief Judge Mukasey, 233 F. Supp. 2d at 571 n.3, the War Powers Resolution was enacted in 1973 over Presidential veto, and purported to limit the President's authority and discretion to commit American troops to actual or potential hostilities without specific congressional authorization. Pub.L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541 *et seq.*). Although President Bush signed the Joint Resolution the day it was passed, he did so noting "the longstanding position of the executive branch regarding the President's constitutional authority to use force, including the Armed Forces of the United States and regarding the Constitutionality of the War Powers Resolution." Press Release, Office of the Press Secretary, President Signs Authorization for Use of Military Force Bill (Sept. 18, 2001) (statement by the President), *available at* http://www.whitehouse.gov/news/releases/2001/09 20010918-10.html.

of 9-11—none of us disputes al Qaeda is responsible for the carnage of that day, (3) in order to prevent future attacks of terrorism against the United States—Padilla is alleged to be closely associated with an al Qaeda plan to carry out an attack in the United States[36] *and* to possess information that if obtained by the U.S. would prevent future terrorist attacks.

The Joint Resolution has limits; it applies only to those subsets of persons, organizations and nations "[the President] determines planned, authorized, committed, or aided the terrorist attacks." Pub.L. No. 107-40, 115 Stat. 224. The President is not free to detain U.S. citizens who are merely sympathetic to al Qaeda.[37] Nor is he broadly empowered to detain citizens based on their ethnic heritage. Rather, the Joint Resolution is a specific and direct mandate from Congress to stop al Qaeda from killing or harming Americans here or abroad.[38] The Joint Resolution is quite clear in its man-

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[36] The majority confirms that "the government had ample cause to suspect Padilla of involvement in a terrorist plot." Maj. at [4a] n.2.

[37] Compare the language of the Joint Resolution, *supra* at [59a-60a], with that of the Emergency Detention Act of 1950, former 50 U.S.C. §§ 811-26 (1970), which authorized the President to detain:

> persons who there is reasonable ground to believe probably will commit or conspire with others to commit espionage or sabotage . . ., in a time of internal security emergency, essential to the common defense and to the safety and security of the territory, the people and the Constitution of the United States.

Id. at § 811(14).

[38] In fact, some in Congress were concerned the "organization" prong of the Joint Resolution was too limited in its scope. They felt the Joint Resolution, as enacted, unnecessarily limited the President's ability to act against terrorist organizations such as

date. Congress noted that the 9-11 attacks made it "both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." *Id.* It seems clear to me that Congress understood that in light of the 9-11 attacks the United States had become a zone of combat.

Organizations such as al Qaeda are comprised of people. Congress could not have intended to limit the President's authority to only those al Qaeda operatives who actually planned or took part in 9-11. That would do little to prevent future attacks. The fate of the participants is well known. And surely Congress did not intend to limit the President to pursue only those individuals who were al Qaeda operatives as of September 11, 2001. But even if it did, Mr. Padilla fits within the class for by September of 2001, he had already been under the tutelage and direction of senior al Qaeda officers for three years. Clearly, Congress recognized that al Qaeda and those who now do its bidding are a continuing threat to the United States. Thus, the Joint Resolution does have teeth and whether Padilla is a loaded weapon of al Qaeda would appear to be a fact question. A hearing, as ordered by the district court, would have settled the matter.

The majority suggests, however, that the President's actions are ultra vires because "the Joint Resolution does not specifically authorize detentions." Maj. at [43a-44a], [50a-55a]. To read the resolution as the majority suggests would create a false distinction between the use of force and the ability to detain. It

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Hamas, Hezbollah and Islamic Jihad. *See, e.g.*, 147 Cong. Rec. H5638, 5643 (2001) (statement of Representative Berman).

would be curious if the resolution authorized the interdiction and shooting of an al Qaeda operative but not the detention of that person.

The majority contends that 18 U.S.C. § 4001(a) prohibits detention of U.S. citizens on U.S. soil as enemy combatants absent a precise and specific statutory authorization from Congress. They offer a detailed history of the statute's enactment, which effectuated a repeal of the Emergency Detention Act of 1950, former 50 U.S.C. §§ 811-26 (1970). I share their view that the plain language of the statute appears to apply to military and civil detentions and that its placement in the U.S. Code does not rebut that conclusion. *See* Maj. at [48a-50a].[39] However, I find it somewhat puzzling that despite the statute's obvious and conceded clarity, the majority, based solely on the statement of one Member of Congress, *see* Maj. at [47a], sees fit to add a condition not found in the words of the section. The statute is quite clear: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). The section neither defines an "Act of Congress" nor contains a requirement that the authorizing enactment use the word "detention." The majority does not contest that the Joint Resolution is an Act of Congress. However, they chafe at its lack of specificity. As noted above, I think it would be quite difficult to conclude that Congress did not envision that detaining a terrorist was a possibility. It is apparent from the legislative record of § 4001(a) and the Joint Resolution that the efforts of Congress in each instance meant and

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[39] I also concur with my colleagues' rejection of the Secretary's argument that 10 U.S.C. § 956(5) constitutes an Act of Congress authorizing detentions such as Padilla's.

implied many different things to individual Members. That is not unusual. It would be quite a surprise to see that Congress was of one mind on any issue; that is the nature of a representative democracy. But one thing is clear, both enactments have the force of law. It is the words used, not the individual motives of legislators, that should serve as the guide. Thus, I think it best to trace a course of legislative intent using the plain and powerful language employed.

The problem with the majority's view of the Joint Resolution of September 18, 2001 is that it reduces the legislative efforts contained therein to a general policy statement notwithstanding the resolution's declaration invoking the War Powers Resolution of 1973. Following the events of 9-11 the President declared a national emergency, 66 Fed.Reg. 48199 (2001), thus triggering the President's war powers authority under The War Powers Resolution. *See* 50 U.S.C. 1541(c)(3). Nothing in the War Powers Resolution of 1973 constrains the President's utilization of his war powers.[40] Congress passed the Joint Resolution and agreed that the President should utilize his war powers with regard to an identified threat. Of course, identifying the threat made sense. Only days earlier the nation had been attacked—American lives had been lost on American soil. Congress responded and invested the President with authority to pursue those responsible for the attacks in order to prevent future attacks.[41] Contrary

[40] Although the President may view the War Powers Resolution as an unconstitutional infringement on his constitutional authority to deal with belligerents, that fight need not be won here.

[41] The majority concludes that Mr. Padilla's detention as a material witness "neutralized" the threat he presented. *See* Maj. at [4a], [42a] n.27. This of course overlooks a significant aspect of

to the implication of the majority, the Joint Resolution was *not* limited in geographic scope. It did not limit the President's authority to foreign theaters. Congress clearly recognized that the events of 9-11 signaled a war with al Qaeda that could be waged on U.S. soil.

The President's authority to detain an enemy combatant in wartime is undiminished by the individual's U.S. citizenship. *Quirin*, 317 U.S. at 37- 38, 63 S. Ct. 1; *see also Hamdi* v. *Rumsfeld*, 296 F.3d 278, 281-83 (4th Cir. 2002). Consequently, Padilla's citizenship here is irrelevant. Moreover, the fact that he was captured on U.S. soil is a distinction without a difference. While Mr. Padilla's conduct may have been criminal, it was well within the threat identified in the Joint Resolution. The resolution recognizes the painful reality of 9-11; it seeks to protect U.S. citizens from terrorist attacks at home and abroad. "[E]ntry upon our territory in time of war by enemy belligerents, including those acting under the direction of armed forces of the enemy . . . is a warlike act." *Quirin*, 317 U.S. at 36-37, 63 S. Ct. 1.[42]

Congress presumably was aware of § 4001(a) when it passed the Joint Resolution. *See Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184, 108 S. Ct. 1704, 100 L.Ed.2d 158 (1988). The resolution was congressional confirmation that the nation was in crisis. Congress

the President's Order of June 9, 2002. Padilla was not only a threat with regard to a specific terrorist plot, *see* Maj. at [4a] n.2, he allegedly possesses information that could assist the United States in thwarting other terrorists plots in the U.S. and abroad.

[42] Under the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(4), 6 U.S.T. 3317, 75 U.N.T.S. 135, prisoners of war subject to capture include all "persons who accompany the armed forces without actually being members thereof."

called upon the President to utilize his Article II war powers to deal with the emergency. By authorizing the President to use necessary and appropriate force against al Qaeda and its operatives, Congress had to know the President might detain someone who fell within the categories of identified belligerents in carrying out his charge. A different view requires a strained reading of the plain language of the resolution and cabins the theater of the President's powers as Commander in Chief to foreign soil. If that was the intent of Congress it was masked by the strong and direct language of the Joint Resolution. And if, as the majority asserts, § 4001(a) is an impenetrable barrier to the President detaining a U.S. citizen who is alleged to have ties to the belligerent and who is part of a plan for belligerency on U.S. soil, then § 4001(a), in my view, is unconstitutional.

Sadly, the majority's resolution of this matter fails to address the real weakness of the government's appeal. Padilla presses to have his day in court to rebut the government's factual assertions that he falls within the authority of the Joint Resolution. The government contends that Mr. Padilla can be held incommunicado for 18 months with no serious opportunity to put the government to its proof by an appropriate standard. The government fears that to do otherwise would compromise its ability both to gather important information from Mr. Padilla and to prevent him from communicating with other al Qaeda operatives in the United States.

While those concerns may be valid, they cannot withstand the force of another clause of the Constitution on which all three of us could surely agree. No one has suspended the Great Writ. *See* U.S. CONST. art. I,

§ 9, cl. 2. Padilla's right to pursue a remedy through the writ would be meaningless if he had to do so alone. I therefore would extend to him the right to counsel as Chief Judge Mukasey did. *See Padilla*, 233 F. Supp. 2d at 599-609. At the hearing, Padilla, assisted by counsel, would be able to contest whether he is actually an enemy combatant thereby falling within the President's constitutional and statutory authority.

One of the more troubling aspects of Mr. Padilla's detention is that it is undefined by statute or Presidential Order. *Compare Quirin*, 317 U.S. at 26-28, 35, 63 S. Ct. 1 (citing former 10 U.S.C. §§ 1553 and 1554 (1940)), *with* 66 Fed. Reg. 57833 (2001). Certainly, a court could inquire whether Padilla continues to possess information that was helpful to the President in prosecuting the war against al Qaeda. Presumably, if he does not, the President would be required to charge Padilla criminally or delineate the appropriate process by which Padilla would remain under the President's control. *See, e.g., Zadvydas* v. *Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L.Ed.2d 653 (2001).

Mr. Padilla's case reveals the unique dynamics of our constitutional government. Padilla is alleged to be a member of an organization that most Americans view with anger and distrust. Yet his legal claims receive careful and thoughtful attention and are examined not in the light of his cause—whatever it may be—but by the constitutional and statutory validity of the powers invoked against him. *See Youngstown*, 343 U.S. at 623, 72 S. Ct. 863 (Jackson, J., concurring).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 02 Civ. 4445(MBM)

JOSE PADILLA, BY DONNA R. NEWMAN,
AS NEXT FRIEND, PETITIONER

v.

DONALD RUMSFELD, RESPONDENT

Dec. 4, 2002

OPINION AND ORDER

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MUKASEY, District Judge.

Petitioner in this case, Jose Padilla, was arrested on May 8, 2002, in Chicago, on a material witness warrant issued by this court pursuant to 18 U.S.C. § 3144 to enforce a subpoena to secure Padilla's testimony before a grand jury in this District. His arrest and initial detention were carried out by the U.S. Department of Justice. As the result of events described below—including the President's designation of Padilla as an enemy combatant associated with a terrorist network called al Qaeda—Padilla is now detained, without formal charges against him or the prospect of release after the giving of testimony before a grand jury, in the custody of the U.S. Department of Defense at the Consolidated Naval Brig in Charleston, South Carolina.

Through his attorney, Donna R. Newman, acting as next friend, Padilla has petitioned pursuant to 28 U.S.C. § 2241, seeking relief in the nature of habeas corpus, challenging the lawfulness of his detention, and seeking an order directing that he be permitted to consult with counsel. He has named as respondents President George W. Bush, Secretary of Defense

Donald Rumsfeld, and Commander M.A. Marr, the officer in charge of the brig where he is detained.[1] The government has moved to dismiss the petition on several grounds, including that Newman lacks standing necessary to establish next friend status, and that this court lacks personal jurisdiction over any proper respondent, and over all of those named as respondents. Alternatively, the government moves to transfer the case to the District of South Carolina, where Padilla is held.

As to the merits, the government argues that the lawfulness of Padilla's custody is established by documents already before this court. Padilla argues that the President lacks the authority to detain him under the circumstances present here, including that he is a United States citizen arrested in the United States, and that in any event he must be permitted to consult with counsel.[2] The government has submitted a classified document *in camera* to be used, if necessary, in aid of deciding whether there exists evidence to justify the order directing that Padilla be detained.

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[1] Initially, Padilla also named Attorney General John Ashcroft as a respondent, but the parties have agreed that he should not be so named, and therefore the petition is dismissed as to him.

[2] In addition, two sets of *amici curiae* have filed briefs. In one brief, the New York State and the National Association of Criminal Defense Lawyers have argued principally that this court has jurisdiction to review Padilla's detention, and that that detention on its current terms is unlawful. In another brief, the American and New York Civil Liberties Union Foundations, and the Center for National Security Studies (collectively "ACLU"), also argue principally that Padilla's detention on its current terms is unlawful.

For the reasons set forth below, the parties' applications and motions are resolved as follows: (i) Newman may pursue this petition as next friend to Padilla, and the government's motion to dismiss for lack of standing therefore is denied; (ii) Secretary Rumsfeld is the proper respondent in this case, and this court has jurisdiction over him, as well as jurisdiction to hear this case, and the government's motion to dismiss for lack of jurisdiction, or to transfer to South Carolina, is denied; (iii) the President is authorized under the Constitution and by law to direct the military to detain enemy combatants in the circumstances present here, such that Padilla's detention is not *per se* unlawful; (iv) Padilla may consult with counsel in aid of pursuing this petition, under conditions that will minimize the likelihood that he can use his lawyers as unwilling intermediaries for the transmission of information to others and may, if he chooses, submit facts and argument to the court in aid of his petition; (v) to resolve the issue of whether Padilla was lawfully detained on the facts present here, the court will examine only whether the President had some evidence to support his finding that Padilla was an enemy combatant, and whether that evidence has been mooted by events subsequent to his detention; the court will not at this time use the document submitted *in camera* to determine whether the government has met that standard.

I. FACTUAL BACKGROUND

The immediate factual and legal predicate for this case lies in the September 11, 2001 attacks on this country, and the government's response. On that date, as is well known, 19 terrorists associated with an organization called al Qaeda hijacked four airplanes,

and succeeded in crashing three of them into public buildings they had targeted—one into each of the two towers of the World Trade Center in New York, and one into the Pentagon near Washington, D.C. The World Trade Center towers were destroyed and the Pentagon was seriously damaged. Passengers on the fourth airplane sought to overpower the hijackers, and in so doing prevented that airplane from being similarly used, although it too crashed, in a field in Pennsylvania, and all aboard were killed. In all, more than 3,000 people were killed in that day's coordinated attacks.

On September 14, 2001, by reason of those attacks, the President declared a state of national emergency. On September 18, 2001, Congress passed Public Law 107-40, in the form of a joint resolution that took note of "acts of treacherous violence committed against the United States and its citizens," of the danger such acts posed to the nation's security and foreign policy, and of the President's authority to deter and prevent "acts of international terrorism against the United States." The resolution, entitled "Authorization for Use of Military Force," (the "Joint Resolution") then provided as follows:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

Authorization for Use of Military Force, Pub. Law No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).[3] As the term "Public Law" connotes, the President signed the Joint Resolution.

On November 13, 2001, the President signed an order directing that persons whom he determines to be members of al Qaeda, or other persons who have helped or agreed to commit acts of terrorism aimed at this country, or harbored such persons, and who are not United States citizens, will be subject to trial before military tribunals, and will not have recourse to any other tribunal, including the federal and state courts of this country. He specifically cited the Joint Resolution in the preamble to that order. Mil. Order of Nov. 13, 2001, 66 Fed.Reg. 57,833, 57,833 (Nov. 16, 2001).

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[3] The Joint Resolution provides also, in section 2(b)(1), that it "is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." Authorization for Use of Military Force, Pub. Law No. 107-40, § 2(b)(1), 115 Stat. 224, 224 (2001). That resolution was enacted in 1973 over Presidential veto, and purported to limit the President's authority and discretion to commit American troops to actual or potential hostilities without specific Congressional authorization. War Powers Resolution, Pub. Law No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541 *et seq.*). Although President Bush signed the Joint Resolution the day it was passed, he did so while maintaining "the longstanding position of the executive branch regarding the President's constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the War Powers Resolution." Press Release, Office of the Press Secretary, President Signs Authorization for Use of Military Force Bill (Sept. 18, 2001) (statement by the President), http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html. The constitutionality of the War Powers Resolution is a matter of debate, has never been tested in court—if indeed it could be—and need not be treated in this opinion.

As previously noted, on May 8, 2002, this court, acting on an application by the Justice Department pursuant to 18 U.S.C. § 3144,[4] based on facts set forth in the affidavit of Joseph Ennis, a special agent of the FBI, found that Padilla appeared to have knowledge of facts relevant to a grand jury investigation into the September 11 attacks. That investigation included an ongoing inquiry into the activities of al Qaeda, an organization believed to be responsible for the September 11 attacks, among others, and to be committed to and involved in planning further attacks. On May 15, 2002, following Padilla's removal from Chicago to New York, where he was detained in the custody of the Justice Department at the Metropolitan Correctional Center ("MCC"), he appeared before this court, and Donna R. Newman, Esq. was appointed to represent him. After Newman had conferred with Padilla at the MCC, and following another court appearance on May 22, 2002, Padilla, represented by Newman, moved to vacate the warrant. The motion to vacate the warrant included an affirmation from Padilla obviously drafted by Newman, albeit one that did not discuss any issue relating to the likelihood that he had information material to a grand jury investigation. (Padilla Affirmation) The motion was fully submitted for decision by June 7.

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[4] That section provides, in relevant part: "If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title." 18 U.S.C. § 3144 (2000).

However, on June 9, 2002, the government notified the court *ex parte* that it was withdrawing the subpoena. Pursuant to the government's request, the court signed an order vacating the warrant. At that time, the government disclosed that the President had designated Padilla an enemy combatant, on grounds discussed more fully below, and directed the Secretary of Defense, respondent Donald Rumsfeld, to detain Padilla. The government disclosed to the court as well that the Department of Defense would take custody of Padilla forthwith, and transfer him to South Carolina, as in fact happened.

On June 11, 2002, Newman and the government appeared before this court at the time a conference had been scheduled in connection with Padilla's then-pending motion to vacate the material witness warrant. At that time, Newman filed a habeas corpus petition pursuant to 28 U.S.C. § 2241[5], later to be amended. In response to an inquiry from the court, the government conceded that after the June 9 Order was signed,

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[5] That section provides, in pertinent part:

> (a) Writs of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions.
>
> . . . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States . . .; or
>
> . . . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

28 U.S.C. § 2241 (2000).

Department of Defense personnel took custody of Padilla in this district. (Tr. of 6/11/02 at 7; *see also* Tr. of 7/31/02 at 17) Newman's petition alleges the facts surrounding Padilla's initial capture and transfer to New York, Newman's activities in connection with representing him, proceedings relating to his motion to vacate the material witness warrant, and his subsequent transfer to South Carolina. (Am.Pet.¶¶ 15-22, 25) Newman has averred that she was told she would not be permitted to visit Padilla at the South Carolina facility, or to speak with him; she was told she could write to Padilla, but that he might not receive the correspondence. (Newman Aff. of 9/24/02 ¶ 8)

In addition to having submitted the above-mentioned affirmation from Padilla in connection with the motion to vacate the material witness warrant, according to the amended petition, it appears that Newman consulted not only with Padilla but also with his family. (Am.Pet.¶ 20) No criminal charges have been filed against Padilla.

The President's order, dated June 9, 2002 (the "June 9 Order"), is attached, in redacted form, to the government's dismissal motion, and sets forth in summary fashion the President's findings with respect to Padilla. Attached as well is a declaration of Michael H. Mobbs ("Mobbs Declaration"), who is employed by the Department of Defense. The Mobbs Declaration sets forth a redacted version of facts provided to the President as the basis for the conclusions set forth in the June 9 Order. In addition to the redacted summary contained in the Mobbs Declaration, the government has submitted, under seal, an unredacted version of information provided to the President ("Sealed Mobbs Declaration"). As set forth more fully below, the government

has argued that the Mobbs Declaration is sufficient to establish the correctness of the President's findings contained in the June 9 Order, although it has made the Sealed Mobbs Declaration available to the court to remedy any perceived insufficiency in the Mobbs Declaration. However, the government has maintained that the Sealed Mobbs Declaration must remain confidential. The government has taken the position that it would withdraw the Sealed Mobbs Declaration sooner than disclose its contents to defense counsel. (Respondents' Resp. to Petitioners' Supplemental Mem. at 11).

The June 9 Order is addressed to the Secretary of Defense, and includes seven numbered paragraphs setting forth the President's conclusion that Padilla is an enemy combatant, and, in summary form, the basis for that conclusion, including that Padilla: is "closely associated with al Qaeda," engaged in "hostile and warlike acts" including "preparation for acts of international terrorism" directed at this country, possesses information that would be helpful in preventing al Qaeda attacks, and represents "a continuing, present and grave danger to the national security of the United States." (June 9 Order ¶¶ 2-5) In addition, the June 9 Order directs Secretary Rumsfeld to detain Padilla. (*Id.* ¶ 6)

The Mobbs Declaration states that Padilla was born in New York and convicted in Chicago, before he turned 18, of murder. Released from prison after he turned 18, Padilla was convicted in Florida in 1991 of a weapons charge. After his release from prison on that charge, Padilla moved to Egypt, took the name Abdullah al Muhajir, and is alleged to have traveled also to Saudi Arabia and Afghanistan. (Mobbs Decl. ¶ 4) In 2001, while in Afghanistan, Padilla is alleged to have

approached "senior Usama Bin Laden lieutenant Abu Zubaydeh" (*id.* ¶ 6) and proposed, among other things, stealing radioactive material within the United States so as to build, and detonate a "'radiological dispersal device' (also known as a 'dirty bomb') within the United States" (*id.* ¶ 8). Padilla is alleged to have done research on such a project at an al Qaeda safehouse in Lahore, Pakistan, and to have discussed that and other proposals for terrorist acts within the United States with al Qaeda officials he met in Karachi, Pakistan, on a trip he made at the behest of Abu Zubaydah. (*See id.* ¶¶ 7-9) One of the unnamed confidential sources referred to in the Mobbs Declaration said he did not believe Padilla was actually a member of al Qaeda, but Mobbs emphasizes that Padilla had "extended contacts with senior Al Qaeda members and operatives" and that he "acted under the direction of [Abu] Zubaydah and other senior Al Qaeda operatives, received training from Al Qaeda operatives in furtherance of terrorist activities, and was sent to the United States to conduct reconnaissance and/or conduct other attacks on their behalf." (*Id.* ¶ 10)

As mentioned above, Padilla was taken into custody on the material witness warrant on May 8, in Chicago, where he landed after traveling, with one or more stops, from Pakistan. (*Id.* ¶ 11)

Dealing with the contents of the Sealed Mobbs Declaration is problematic. Padilla argues that I should not consider it at all, at least unless his lawyers have access to it and, he argues, he has an opportunity to respond to its contents. The government argues that I must not disclose it, but that I need not consider it because the redacted version of what the President was told, as set forth in the Mobbs Declaration, is enough to

justify the June 9 Order, unless for some reason I think otherwise, in which case I am invited to examine it *in camera.* Although neither the government nor Padilla mentions the point, the contents of the Sealed Mobbs Declaration could relate to another issue—whether, as the government claims, there is a reasonably cognizable risk to national security that could result from permitting Padilla to consult with counsel.

Although Padilla had been under arrest pursuant to the material witness warrant since May 8, his arrest was announced on June 10, after he was taken into Defense Department custody, by the President and by Attorney General John Ashcroft, who made his announcement during a trip to Moscow. *See* James Risen & Philip Shenon, *Traces of Terror: The Investigation; U.S. Says it Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. Times, June 11, 2002, at A1.

Secretary Rumsfeld was questioned at a press briefing on Wednesday, June 12, during a trip to Doha, Qatar, about how close he thought Padilla and others were to being able to build a "dirty bomb," and whether he thought Padilla would be "court martialled."[6] News Briefing, Department of Defense (June 12, 2002), 2002 WL 22026773. In response, Secretary Rumsfeld described Padilla as "an individual who unquestionably was involved in terrorist activities against the United States." *Id.* He said that Padilla "will be held by the United States government through the Department of Defense and be questioned." *Id.* He then added that in order to protect the United States and its allies, "one

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[6] This was apparently an inartful reference to trial before a military tribunal, a procedure the President has already declared he will not apply to American citizens. *See supra* p. [81a].

has to gather as much [ ] intelligence information as is humanly possible." *Id.* Secretary Rumsfeld then summarized as follows how Padilla would be dealt with:

> Here is an individual who has intelligence information, and it is, in answer to the last part of your question—will be submitted to a military court, or something like that—our interest really in his case is not law enforcement, it is not punishment because he was a terrorist or working with the terrorists. Our interest at the moment is to try and find out everything he knows so that hopefully we can stop other terrorist acts.

Id.

Secretary Rumsfeld distinguished as follows the government's handling of Padilla from its handling of the usual case of one charged with breaking the law:

> It seems to me that the problem in the United States is that we have—we are in a certain mode. Our normal procedure is that if somebody does something unlawful, illegal against our system of government, that the first thing we want to do is apprehend them, then try them in a court and then punish them. In this case that is not our first interest.
>
> Our interest is to—we are not interested in trying him at the moment; we are not interested in punishing him at the moment. We are interested in finding out what he knows. Here is a person who unambiguously was interested in radiation weapons and terrorist activity, and was in league with al Qaeda. Now our job, as responsible government officials, is to do everything possible to find out what

> that person knows, and see if we can't help our country or other countries.

Id.

Secretary Rumsfeld offered anecdotal evidence to justify applying to Padilla procedures different from those applied to prisoners arrested in conventional cases:

> If you think about it, we found some material in Kandahar that within a week was used—information, intelligence information—that was used to prevent a[t] least three terrorist attacks in Singapore—against a U.S. ship, against a U.S. facility and against a Singaporean facility.
>
> Now if someone had said when we found that information or person, well now let's us arrest the person and let's start the process of punishing that person for having done what he had did, we never would have gotten that information. People would have died.
>
> So I think what our country and other countries have to think of is, what is your priority today? And given the power of weapons and given the number of terrorists that exist in the world, our approach has to [be] to try to protect the American people, and provide information to friendly countries and allies, and protect deployed forces from those kind of attacks.
>
> I think the American people understand that, and that notwithstanding the fact that some people are so locked into the other mode that they seem not

> able to understand it, I suspect that . . . the American people will.

Id. Secretary Rumsfeld's quoted statements appear to show both his familiarity with the circumstances of Padilla's detention, and his personal involvement in the handling of Padilla's case.

It is not disputed that Padilla is held incommunicado, and specifically that he has not been permitted to consult with Newman or any other counsel.

Although the immediate predicate for this case lies in the events of September 11 and their consequences, that date did not mark the first violent act by al Qaeda directed against the United States. An indictment styled *United States* v. *Bin Laden*, No. 98 Cr. 1023, charged defendants allegedly affiliated with that organization in connection with the August 1998 bombing of United States embassies in Nairobi, Kenya and Dar-Es-Salaam, Tanzania. According to that indictment, which was tried to a guilty verdict in the summer of 2001, al Qaeda emerged in 1989, under the leadership of Usama Bin Laden. *See United States* v. *Bin Laden*, 92 F. Supp. 2d 225, 228-29 (S.D.N.Y. 2000). As summarized by Judge Sand, who presided at that trial, the indictment portrayed al Qaeda as a "vast, international terrorist network" that functioned on its own and in cooperation with like-minded groups to oppose the United States through the use of "violent, terrorist tactics." *Id.* "From time to time, according to the Indictment, Bin Laden would issue rulings on Islamic law, called 'fatwahs,' which purported to justify al Qaeda's violent activities." *Id.* at 229. Bin Laden has declared a "jihad" or holy war against the United States. *Id.* at 230.

In addition to the September 11 attack and the 1998 bombings in Kenya and Tanzania, al Qaeda is believed, at a minimum, to be responsible for the October 2000 bombing of the U.S.S. Cole that killed 17 U.S. sailors, and to have participated in the October 1993 attack on U.S. military personnel serving in Somalia that killed 18 soldiers. (*Id.*)

On October 8, 1999, al Qaeda was designated by the Secretary of State as a foreign terrorist organization, pursuant to section 219 of the Immigration and Nationality Act. *See Designation of Foreign Terrorist Organizations*, 64 Fed.Reg. 55,112 (1999). It has also been similarly designated by the Secretary of State under the International Emergency Economic Powers Act. *See Additional Designations of Terrorism-Related Blocked Persons*, 66 Fed.Reg. 54,404 (2001).

II. NEWMAN'S STANDING AS NEXT FRIEND

The first of the several issues presented by this petition concerns Newman's Standing to assert a claim as next friend. The statute, 28 U.S.C. § 2242 (2000), provides that an application for relief thereunder "shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." The Supreme Court has explained that this provision was intended to permit a third party to sue as next friend when a prisoner is unable to seek relief himself. *See Whitmore* v. *Arkansas*, 495 U.S. 149, 162, 110 S. Ct. 1717, 109 L.Ed.2d 135 (1990) ("Most frequently, 'next friends' appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves."). In *Whitmore*, the Court described as follows the requirements for next friend standing:

> "[N]ext friend" standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another. Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for "next friend" standing. First, a "next friend" must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest.

Id. at 163-64, 110 S. Ct. 1717 (citations omitted).

The Court placed the burden on the next friend "clearly to establish the propriety of his status and thereby justify the jurisdiction of the court." *Id.* at 164, 110 S. Ct. 1717. The Court explained that the limitations on next friend status "are driven by the recognition that '[i]t was not intended that the writ of habeas corpus should be availed of, as a matter of course, by intruders or uninvited meddlers, styling themselves next friends.'" *Id.* (quoting *United States ex rel. Bryant* v. *Houston*, 273 F. 915, 916 (2d Cir. 1921)). The Court added that "if there were no restriction on 'next friend' standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'" *Id.*

Of the factors listed in *Whitmore* to support a finding of next friend status—inaccessibility of the party in interest, the proposed next friend's dedication to the

welfare of that party, and a "significant relationship" between the proposed next friend and that party—the government disputes Newman only as to the last. It argues that Newman's relationship with Padilla is not sufficiently significant to warrant recognizing her as next friend in this case (Mot. to Dismiss Am. Pet. at 8-10), and suggests instead that a member of Padilla's immediate family, if so inclined, might serve in that capacity (*id.* at 10; Respondents' Reply in Supp. of Mot. to Dismiss Am. Pet. at 7- 8). Here, the government relies principally on *Hamdi* v. *Rumsfeld*, 294 F.3d 598 (4th Cir. 2002), a case involving a petitioner who is also detained as an enemy combatant, in whose behalf a federal public defender sought to file a habeas corpus petition as next friend. The federal defender in that case had no preexisting relationship with Hamdi, *id.* at 604, and there existed a person known to the federal defender—Hamdi's father—who did have such a relationship, *id.* at 606. Indeed, Hamdi's father petitioned for next friend status. *Id.* The Court said, "[w]e need not decide just how significant the relationship between the would-be next friend and the real party in interest must be in order to satisfy the requirements for next friend standing. It suffices here to conclude that no preexisting relationship whatever is insufficient." *Id.* at 604. The Court reasoned, "[A]bsent a requirement of some significant relationship with the detainee, there is no principled way to distinguish a Public Defender from someone who seeks simply to gain attention by injecting himself into a high-profile case, and who could substantiate alleged dedication to the best interests of the real party in interest by attempting to contact him and his family." *Id.* at 605. Notably, the Court in *Hamdi* explicitly declined to say "that an attorney can never possess next friend

standing, or that only the closest relative can serve as next friend." *Id.* at 607.

This case is easily distinguished from *Hamdi*. Here, Newman had a preexisting relationship with Padilla that involved directly his apprehension and confinement. She had conferred with him over a period of weeks in aid of an effort to end that confinement. She submitted at least one affidavit that he signed, and was engaged in attacking the legal basis of his confinement when he was taken into custody by the Defense Department. She is at once the person most aware of his wishes in this case and the person best suited to try to achieve them. It is of no significance whatever that when she and Padilla formed their relationship he was in the custody of the Justice Department and now he is in the custody of a different executive department. The legal issues may have changed, but the nature of the relationship between Newman and her client has not.

Not only does Newman have a significant and relevant relationship with Padilla, but she appears also to have conferred with Padilla's relatives. (*See* Am. Pet. ¶ 20 ("As an additional part of her representation of Mr. Padilla, Petitioner Donna R. Newman . . . consulted with both members of Mr. Padilla's family and representatives of the Government. She continues to consult with the Government and Mr. Padilla's family in her role as his attorney.")) She is certainly neither an "intruder" nor an "uninvited meddler." *Whitmore*, 495 U.S. at 164, 110 S. Ct. 1717.

Despite the government's casual suggestion that some other member of Padilla's family might serve as a next friend in this case (Mot. to Dismiss Am. Pet. at 10; Respondents' Reply in Supp. of Mot. to Dismiss Am. Pet. at 7-8), there is no indication here that any other

member of Padilla's family, unlike the detainee's father in *Hamdi*, wishes to assume that role in place of Newman. The government cites several cases in which family members have been granted next friend status, and argues, extravagantly, that those cases show that "'[n]ext friend' standing is typically reserved for those who have a close, *personal* relationship with a detainee —like a parent, spouse, or sibling." (Mot. to Dismiss Am. Pet. at 9) Those cases stand for no such principle. Rather, they involve for the most part capital defendants who have elected to forgo appeals and whose competence is in question. In such cases, courts have permitted family members to intervene as next friends to seek stays of execution. *See, e.g., Vargas* v. *Lambert*, 159 F.3d 1161, 1168 (9th Cir. 1998) (mother had standing to seek stay of execution to allow for hearing on son's competency); *In re Heidnik*, 112 F.3d 105, 112 (3d Cir. 1997) (per curiam) (daughter could serve as next friend to stop father's execution upon showing he suffered from paranoid schizophrenia). However, when incompetence has not been shown, courts have denied next friend status even to close relatives. *See Brewer* v. *Lewis*, 989 F.2d 1021, 1026 (9th Cir. 1993) (mother did not have next friend standing because she failed to show defendant was incompetent).

The government quotes selectively from *T.W. by Enk* v. *Brophy*, 124 F.3d 893 (7th Cir. 1997), in an effort to show that a next friend ordinarily should be a relative. However, the Court was concerned in that case specifically with who should serve as a next friend when the real party in interest was a minor child. In such a case, it is obvious that:

> ordinarily the eligibles will be confined to the plaintiff's parents, older siblings (if there are no parents),

> or a conservator or other guardian, akin to a trustee; that persons having only an ideological stake in the child's case are never eligible; but that if a close relative is unavailable and the child has no conflict-free general representative the court may appoint a personal friend of the plaintiff or his family, a professional who has worked with the child, or, in desperate circumstances, a stranger whom the court finds to be especially suitable to represent the child's interests in the litigation.

Id. at 897. That case does not support the government's position here.

The government has informed me that the Ninth Circuit recently decided *Coalition of Clergy* v. *Bush*, 310 F.3d 1153 (9th Cir. 2002), but that case, involving a group of self-appointed "clergy, lawyers and law professors," *id.* at 1156, presents the classic "intruder" and "uninvited meddler" scenario that *Whitmore* found insufficient to confer standing. *See Whitmore*, 495 U.S. at 164, 110 S. Ct. 1717. *Coalition of Clergy* does not read on this case.

Both sides refer to *Lenhard* v. *Wolff*, 443 U.S. 1306, 100 S. Ct. 3, 61 L.Ed.2d 885 (1979) (Rehnquist, Circuit Justice, in chambers). There, Justice Rehnquist found it telling that a capital defendant's family declined to join in the effort to secure further judicial review of his sentence, and drew the inference that they felt the defendant was competent to waive further proceedings and therefore that the predicate showing of incompetence necessary to permit a next friend petition when the detainee is accessible and can act for himself had not been made. *Id.* at 1310. However, he also stated his view "that from a purely technical standpoint a public defender may appear as 'next friend' with as much

justification as the mother of [one or another capital defendant]." *Id.* As noted above, there is no issue of competence in this case; the reason for seeking next friend standing is inaccessibility, and the government has conceded that.

There being no "technical" impediment to appointing a lawyer to serve as next friend, it is not surprising that courts have done so in appropriate cases. *See, e.g.*, *Miller ex rel. Jones* v. *Stewart*, 231 F.3d 1248 (9th Cir. 2000) (granting next friend status to lawyer seeking to stay execution and remanding for hearing on defendant's competence); *Ford* v. *Haley*, 195 F.3d 603, 624 (11th Cir. 1999) (recognizing that lawyer who had represented petitioner for years was as fit as a relative to serve as next friend); *In re Cockrum*, 867 F. Supp. 494, 495 (E.D. Tex. 1994) (condemned prisoner was incompetent; lawyer who had represented him earlier could serve as next friend). Although Newman does not have the years-long relationship with Padilla that the lawyer in *Ford* had with her client, she has a sufficient relationship to overcome any suggestion that she is a mere intermeddler pursuing her own agenda.

Newman may act as next friend to Padilla here.

III. THIS COURT'S JURISDICTION

The government argues as well that this action must be dismissed, or transferred to the District of South Carolina because the only proper respondent in a case such as this is Padilla's custodian; Padilla's only custodian is Marr, the commander of the brig in South Carolina where Padilla is housed; and she is not within this court's jurisdiction. The government has moved to dismiss the petition against respondents other than Marr. For the reasons set forth below, that motion is

granted with respect to the President and, *mea sponte*, as to Commander Marr, but is denied as to Secretary Rumsfeld.

The government's jurisdictional argument raises subsidiary issues: who is the proper respondent in a case such as this, whether this court has jurisdiction over that respondent, and whether this case should be transferred to South Carolina.

A. *Who Is A Proper Respondent?*

As the government would have it, there is only one proper respondent to a habeas corpus petition, and that is the detainee's "immediate, not ultimate, custodian." (Mot. to Dismiss Am. Pet. at 11) The government points to language in 28 U.S.C. § 2242 directing that a petitioner "shall allege . . . the name of the person who has custody over him," as well as language in 28 U.S.C. § 2243, requiring that a writ or order to show cause "shall be directed to the person having custody of the person detained," and providing that, "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained," and argues, citing *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000), that this language "indicates that there is only one proper respondent to a habeas petition," *id.* at 693.

It is certainly true that in the usual habeas corpus case brought by a federal prisoner, courts have held consistently that the proper respondent is the warden of the prison where the prisoner is held, not the Attorney General. *See, e.g., Sanders* v. *Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945) ("But the Attorney General is not the person directly responsible for the operation of our federal penitentiaries. He is a supervising official rather than a jailer. For that reason, the proper person

to be served in the ordinary case is the warden of the penitentiary in which the prisoner is confined rather than an official in Washington, D.C., who supervises the warden."). The government cites numerous cases to the same effect. (*See* Mot. to Dismiss Am. Pet. at 15 n.6) Similarly, as a general rule, the proper respondent to a petition brought by a military prisoner who challenges a court martial conviction is the warden of the facility where he is held. The government cites, for example, *Monk* v. *Secretary of the Navy*, 793 F.2d 364 (D.C. Cir. 1986), where the Court held "that for purposes of the federal habeas corpus statute, jurisdiction is proper only in the district in which the immediate, not the ultimate, custodian is located," *id.* at 369.

However, what makes the usual case usual is that the petitioner is serving a sentence, and the list of those other than the warden who are responsible for his confinement includes only people who have played particular and discrete roles in confining him, notably the prosecuting attorney and the sentencing judge, and who no longer have a substantial and ongoing role in his continued confinement. The warden becomes the respondent of choice almost by default. As discussed below, this is not the usual case.

The hint of a more flexible approach in other than usual cases may be found even in authority cited by the government, involving prisoners who file § 2241 petitions challenging parole determinations. In *Billiteri* v. *United States Bd. of Parole*, 541 F.2d 938 (2d Cir. 1976), although the Court held that a prisoner denied parole should sue the prison warden, not the Board of Parole, it added that a different conclusion might follow if the

petitioner were challenging a detention that resulted from a parole violation:

> There are, to be sure, circumstances where a parole board may properly be considered a custodian for habeas corpus purposes, e.g., after a prisoner has been released into its custody on parole, or arguably, when the Board itself has caused a parolee to be detained for violation of his parole.

Id. at 948 (citations omitted); *see also Guerra* v. *Meese*, 786 F.2d 414, 417 (D.C. Cir. 1986) (warden held to be the proper respondent, but "[w]hen the appellees are paroled, if ever, the Parole Commission might then be considered their custodian, within the meaning of the habeas corpus statute").

Padilla argues that this case is analogous to the situation described in *Billiteri*, and cites *Bennett* v. *Soto*, 850 F.2d 161 (3d Cir. 1988), where the Court held that the chair of the board of parole was responsible for revocation of petitioner's parole, and that he, rather than the warden, was the proper respondent for a petition brought under the analogous Virgin Island habeas statute, *id.* at 163; *see also McCoy* v. *United States Bd. of Parole*, 537 F.2d 962, 964-65 (8th Cir. 1976) (Board of Parole, which issued warrant and lodged detainer, and not warden of detaining institution, is proper respondent). Other courts dealing with parole have gone even further, and held that a federal prisoner challenging the determination of his parole date may name the Parole Commission as a respondent. *See Dunn* v. *United States Parole Comm'n*, 818 F.2d 742, 744 (10th Cir. 1987) (per curiam) (Parole Commission, not warden, "may be considered petitioner's 'custodian' for purposes of a challenge to a parole decision under 28

U.S.C. § 2241"); *see also Misasi* v. *United States Parole Comm'n*, 835 F.2d 754, 755 n.1 (10th Cir. 1987) (citing *Dunn* for the propriety of naming the Parole Commission).

In *Ahrens* v. *Clark*, 335 U.S. 188, 68 S. Ct. 1443, 92 L.Ed. 1898 (1948), the Supreme Court left open the question of whether the Attorney General may be named as a respondent when an alien petitions under § 2241 to challenge his detention pending deportation. After *Ahrens*, our Court of Appeals has held out at least the possibility that the Attorney General might be a proper respondent in petitions brought by aliens detained in facilities of the Immigration and Naturalization Service ("INS"). In *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998), the Court considered, but did not decide, whether the Attorney General could be a proper respondent in such cases. Two of the petitioners in *Henderson* named both the INS district director in Louisiana and the Attorney General as respondents. *Id.* at 122. Although the petitioners were not lodged in Louisiana, they were seeking release from detainers lodged by the INS district director in Louisiana. *Id.* The Henderson Court certified to the New York Court of Appeals the question of whether the INS district director in Louisiana was subject to New York long-arm jurisdiction, *id.* at 124, and although it did not rule on the propriety of naming the Attorney General, did discuss that issue at some length. The Court said that "additional factors related to the unique role that the Attorney General plays in immigration matters may be taken to suggest that she may be a proper respondent in alien habeas cases." *Id.* at 125-26. The Court added that the Attorney General "has the power to produce the petitioners, remains the ultimate decisionmaker as

to matters concerning the INS, and is commonly designated a respondent in these cases, even when personal jurisdiction over the immediate custodian clearly lies." *Id.* at 126 (citations omitted). The *Henderson* Court took note of the dictum in *Billiteri*, discussed above, *see supra* [99a-100a], to the effect that a parole board might be the proper respondent if the board itself caused a parolee to be detained, and analogized the parolee to the alien in that the Attorney General by her own decision caused the alien to be detained. *Henderson*, 157 F.3d at 126 n.22 (discussing *Billiteri*, 541 F.2d at 948).

The *Henderson* Court also acknowledged arguments against naming the Attorney General, including that the INS district director, rather than the Attorney General, exercised primary control over petitioners, and that "*Billiteri* appears to bar the designation of a higher authority (in that case, the parole board) as a custodian when a habeas petitioner is under the day-to-day control of another custodian (such as the prison warden)." *Id.* at 126-27. Although the *Henderson* Court acknowledged the government's concern that aliens could engage in forum shopping, it noted "that traditional venue doctrines are fully applicable in habeas suits" and these doctrines "if strictly applied, would do much to prevent forum shopping." *Id.* at 127. Although the Court's conclusion, in dictum, appears before this discussion, what the Court appears to have taken from these various considerations is the following: "Historically, the question of who is 'the custodian,' and therefore the appropriate respondent in a habeas suit, depends primarily on who has the power

over the petitioner and, as we will discuss below, on the convenience of the parties and the court." *Id.* at 122.[7]

Other cases, some that concededly do not involve incarcerated prisoners, but others that do, also suggest that the issue of who is the proper respondent is not always subject to a formulaic answer, and may turn on the facts before the court. Thus, in a case involving inactive reservists, the government contested the petitioners' attempt to name the Secretaries of the Army and Air Force, arguing that only the "immediate custodian" was the proper respondent. *Eisel* v. *Sec'y of the Army*, 477 F.2d 1251, 1254 (D.C. Cir. 1973). The Court declined to permit the Secretary of the Army or the Air Force to be named as a respondent, and emphasized the difference between the inactive reservist situation and the case of an incarcerated prisoner, *id.* at 1262, but dealt as follows with the government's "immediate custodian" argument:

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[7] Both before and after *Henderson*, district courts in our Circuit have divided on whether the Attorney General can be named a respondent in such actions. *Compare, e.g., Lee* v. *Ashcroft*, 216 F. Supp. 2d 51, 54 (E.D.N.Y. 2002) (Attorney General is proper respondent), *with, e.g., Carvajales-Cepeda* v. *Meissner*, 966 F. Supp. 207, 209 (S.D.N.Y. 1997) (district director, not Attorney General, is proper respondent). In *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000), the Court held that the Attorney General is not the proper respondent, although it left open the opposite possibility in "extraordinary cases" such as a case where a petitioner was held at an undisclosed location or one "in which the INS spirited an alien from one site to another in an attempt to manipulate jurisdiction." *Id.* at 696. Without much discussion, the Third Circuit held in *Yi* v. *Maugans*, 24 F.3d 500 (3d Cir. 1994), that the warden and not the INS district director is the custodian for habeas purposes in INS cases. *Id.* at 507.

> [W]hile the statute does provide that the action shall be against the "person having custody of the person detained," it does not define "custody" or specify who the person having "custody" will be. Nowhere does the statute speak of an "immediate custodian" or intimate that an action must necessarily be instituted in the location of such an "immediate custodian," even if it were possible to grant substance to the vague concept of "immediate custodianship."

Id. at 1258 (footnotes omitted). Moreover, in other armed forces cases, courts have permitted the Secretaries of the Air Force and the Navy to be named as respondents. *See Lantz* v. *Seamans*, 504 F.2d 423 (2d Cir. 1974) (per curiam) (upholding jurisdiction of New York court over Secretary of the Air Force in case of petitioning reservist); *Carney* v. *Sec'y of Def.*, 462 F.2d 606 (1st Cir. 1972) (Secretary of the Navy was proper respondent to petition brought by Navy serviceman).

Finally, in *Demjanjuk* v. *Meese*, 784 F.2d 1114 (D.C. Cir. 1986) (Bork, J., in chambers), Judge Bork dealt with a petitioner seeking to avoid extradition who was being held at an undisclosed location. Judge Bork concluded that, "in these very limited and special circumstances" the Attorney General would be treated as the custodian and jurisdiction would lie in the D.C. Circuit alone. *Id.* at 1116.

Of the particular facts present here, the one that seems to me to bear most directly on the issue of who is a proper respondent is the personal involvement of the Cabinet-level official named as a respondent in the matter at hand. It was Secretary Rumsfeld who was charged by the President in the June 9 Order with detaining Padilla; it was plainly Secretary Rumsfeld who, in following that order, sent Defense Department

personnel into this District to take custody of Padilla; it could only have been Secretary Rumsfeld, or his designee, who determined that Padilla would be sent to the brig in South Carolina, as opposed to a brig or stockade elsewhere; and, based on his own statements quoted above, *see supra* pp. [87a-90a], it would appear to be Secretary Rumsfeld who decides when and whether all that can be learned from Padilla has been learned, and, at least in part, when and whether the danger he allegedly poses has passed. This level of personal involvement by a Cabinet-level officer in the matter at hand is, so far as I can tell, unprecedented. Certainly, neither side, and no amicus, has cited a case even remotely similar in this respect. How "limited," *Demjanjuk*, 784 F.2d at 1116, these circumstances may be—that is, in how many other cases, if any, the Secretary of Defense may have such personal involvement—I know not. However, when viewed in comparison to past cases, the circumstances present here seem at least "very special." *Id.* On these facts, the Secretary of Defense is the proper respondent.

As noted, Padilla has also sued the President. However, there are at least two reasons why the President should be dismissed as a party: first, Padilla does not seem to be seeking relief from the President; further, based on the authority cited below, the question of whether the President can be sued in this case raises issues this court should avoid if at all possible, and it is certainly possible to avoid them here.

Although it was the President who found that Padilla is an enemy combatant, and who signed the June 9 Order directing the Secretary of Defense to take custody of him, a common-sense assessment suggests that it is now the Secretary of Defense who decides

what happens to Padilla. Based on where Padilla is housed—in a naval brig in South Carolina—and Secretary Rumsfeld's own statements as to the need to find out what Padilla knows and to detain him because of the danger he presents to national security, it is obviously Defense Department personnel rather than White House personnel who are interrogating Padilla, evaluating the worth of any information he provides, and deciding what danger, if any, he may continue to pose. Thus, although the June 9 Order directs the Secretary of Defense to take custody of Padilla, I do not interpret it to mean that the Secretary must hold Padilla until the President directs otherwise. Nor would I conclude that if the Secretary were lawfully directed by a court to release Padilla, he would refuse to do so on the basis of the June 9 Order. It does not appear that the President has an ongoing involvement in Padilla's custody, and therefore Padilla does not appear to be seeking any relief from the President. Therefore, on these facts, even assuming that this court can direct the President to act, of which more in a moment, the President is not a proper party.

Moreover, the government has cited persuasive authority to the effect that this court has no power to direct the President to perform an official act. (Mot. to Dismiss Am. Pet. at 14) The relevant considerations are set forth in *Franklin* v. *Massachusetts*, 505 U.S. 788, 112 S. Ct. 2767, 120 L.Ed.2d 636 (1992), quoted below, where the plurality reversed a district court injunction directing the President to recalculate the number of representatives of the State of Massachusetts, and reasoned as follows:

> While injunctive relief against executive officials like the Secretary of Commerce is within the courts'

> power, *see Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, the District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows. We have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely "ministerial" duty, *Mississippi* v. *Johnson*, 4 Wall. 475, 498-499, 18 L.Ed. 437 (1866), and we have held that the President may be subject to a subpoena to provide information relevant to an ongoing criminal prosecution, *United States* v. *Nixon*, 418 U.S. 683, 694, 94 S. Ct. 3090, 41 L.Ed.2d 1039 (1974), but in general "this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi* v. *Johnson*, *supra*, 4 Wall. at 501. At the threshold, the District Court should have evaluated whether injunctive relief against the President was available, and, if not, whether appellees' injuries were nonetheless redressable.
>
> For purposes of establishing standing, however, we need not decide whether injunctive relief against the President was appropriate because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone.

Id. at 802-03, 112 S. Ct. 2767. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S. Ct. 1319, 99 L.Ed.2d 534 (1988). In this case, as in *Franklin*, the necessary relief, if any, may be secured by an order to the Secretary alone, and the

President can be dismissed as a party. There is no need to decide whether, were the facts otherwise, the President too could be named a respondent in a habeas corpus case such as this.

Although petitioner has named Commander Marr as a respondent, he and amici New York and National Criminal Defense Lawyers argue that she is not a necessary respondent in this case because she takes her orders from Secretary Rumsfeld and, indirectly, from President Bush, and cannot produce Padilla in violation of those orders without subjecting herself to a court martial. (Petitioners' Reply to Mot. to Dismiss Am. Pet. at 22-23) The government responds by pointing out that, "[n]o warden of any penal facility possesses independent power to release a prisoner, yet wardens are universally designated as the proper custodians in prisoner habeas cases." (Respondents' Reply in Supp. of Mot. to Dismiss Am. Pet. at 18) This debate now seems beside the point. I have already determined that Secretary Rumsfeld is a proper respondent, and there is nothing to indicate that he cannot or would not direct Commander Marr to obey any lawful order of this court, if necessary. Accordingly, the petition will be dismissed also as to Commander Marr.

B. *Territorial Jurisdiction*

The habeas corpus statute, 28 U.S.C. § 2241(a) (2000), permits the writ to be granted by district courts "within their respective jurisdictions." The government argues that this phrase operates to limit the jurisdiction of the court to grant the writ, beyond any limits otherwise imposed by the Federal Rules of Civil Procedure, and requires, at a minimum, that the respondent be physically present within this District in

order for the court to grant relief. (Mot. to Dismiss at 17; Respondents' Reply in Supp. of Mot. to Dismiss Am. Pet. at 22) However, for the reasons set forth below, the government's reading of the statute is inconsistent with governing authority, and this court may grant relief under the statute if relief is otherwise warranted.

The subject phrase—"within their respective jurisdictions"—was read initially by the Supreme Court in *Ahrens* v. *Clark*, 335 U.S. 188, 68 S. Ct. 1443, 92 L.Ed. 1898 (1948), to require that a petitioner be physically present within the geographic boundaries of the district before a petition could be heard. However, the Court did away with that requirement in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 93 S. Ct. 1123, 35 L.Ed.2d 443 (1973), where it held that a prisoner confined in an Alabama state prison following a felony conviction could seek habeas corpus relief in Kentucky to attack an indictment pending there, reasoning that in enforcing a Kentucky detainer, the Alabama warden was acting simply as the agent of the state of Kentucky, which was the real custodian. The Court said:

> Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Id. at 495, 93 S. Ct. 1123. In *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998), the Second Circuit relied on

Braden for the proposition that a New York district court would have jurisdiction to hear the § 2241 petitions of detained aliens so long as it had jurisdiction over the petitioners' custodian through New York's long-arm statute, N.Y. C.P.L.R. § 302(a)(1) (McKinney 1990): "A court has personal jurisdiction in a habeas case 'so long as the custodian can be reached by service of process.'" *Id.* at 122 (quoting *Braden*, 410 U.S. at 495, 93 S. Ct. 1123). The *Henderson* Court then certified to the New York Court of Appeals the question of whether New York's long-arm statute reached the INS district director in Louisiana, where the *Henderson* petitioners were detained. That Court declined to answer the question, and the parties then resolved the cases amicably. *See Yesil* v. *Reno*, 175 F.3d 287 (2d Cir. 1999) (per curiam). The Second Circuit has not considered the issue since.

However, before *Henderson*, in *U.S. ex rel. Sero* v. *Preiser*, 506 F.2d 1115 (2d Cir. 1974), the Second Circuit had occasion to consider the reach of a district court's jurisdiction under § 2241(a) when it construed § 2241(d), which directs that in a state having more than one district, a habeas petition from a prisoner in state custody pursuant to a state conviction be filed in either the district of conviction or the district of confinement, with the district courts involved then having discretion to transfer the case as they deem necessary. The Court noted that both the enactment of § 2241(d) in 1966, and the Supreme Court's decision in *Braden*, were intended to undo the damage caused by *Ahrens*, and said, based on both *Braden* and the statute itself, that it made sense to read § 2241(d) as a provision fixing venue rather than jurisdiction. The Court reasoned in part as follows: "If the original jurisdictional grant in § 2241(a)

was to be construed as coextensive with the scope of service of process, see Fed. R. Civ. P. 4(f), then a jurisdictional reading of § 2241(d) would render that subsection merely repetitious." *Id.* The Court's view that § 2241(a) was "coextensive with the scope of service of process" followed, at least in part, from its reading of *Braden*.

Both before and after *Henderson*, several district courts in this Circuit have held that if a respondent can be reached through the forum state's long-arm statute, the court has jurisdiction to hear the petition, *see, e.g.*, *Barton* v. *Ashcroft*, 152 F. Supp. 2d 235, 239 (D. Conn. 2001); *Perez* v. *Reno*, No. 97 Civ. 6712, 2000 WL 686369, at *3 (S.D.N.Y. May 25, 2000); as has a district court in the Sixth Circuit, *see Roman* v. *Ashcroft*, 162 F. Supp. 2d 755, 758 (N.D. Ohio 2001).

The government disagrees with those cases, and argues that habeas corpus jurisdiction is different. It notes that 28 U.S.C. § 1391(e), which provides for nationwide service of process on federal officials, does not apply in habeas corpus proceedings, and argues that *Braden* did nothing to change what the government perceives as the requirement that the custodian in habeas cases involving incarcerated prisoners be located within the district where the petition is filed. Padilla does not assert that § 1391(e) does so apply, but simply that a district court can exercise long-arm jurisdiction if the facts otherwise so warrant, even without resort to § 1391(e). *See Perez*, 2000 WL 686369, at *3 (acknowledging that 28 U.S.C. § 1391(e) does not apply, but exercising jurisdiction over out-of-state respondent through New York's long-arm statute).

It is not only *Henderson*, which I recognize assumed more than held that New York's long-arm statute can

provide the basis for personal jurisdiction over habeas corpus respondents, and the above-cited cases, which are not binding authority, that cut against the government's reading of *Braden* and therefore against its position here. The Supreme Court cases that antedated *Braden* provide a context for that case that undercuts the government's position.

One such case, relied on by the government, is *Schlanger* v. *Seamans*, 401 U.S. 487, 91 S. Ct. 995, 28 L.Ed.2d 251 (1971), where the petitioner, a serviceman on "permissive temporary duty" attending school in Arizona, sued in Arizona alleging that his enlistment contract had been breached. He named as respondents the Secretary of the Air Force, the commander of Moody Air Force Base, in Georgia, to which he had been assigned, and the commander of the ROTC program at the school he was attending. The Court framed the issue as follows: "The question in the instant case is whether any custodian, or one in the chain of command, as well as the person detained, must be in the territorial jurisdiction of the court." *Id.* at 489, 91 S. Ct. 995. The Court concluded that it was the commander of the Georgia base who was the proper custodian, and therefore, "the District Court in Arizona has no custodian against whom its writ can run . . . . [T]he absence of the custodian is fatal to the jurisdiction of the Arizona District Court." *Id.* at 491, 91 S. Ct. 995.

However, a year later, in *Strait* v. *Laird*, 406 U.S. 341, 92 S. Ct. 1693, 32 L.Ed.2d 141 (1972), the Court considered the petition of an inactive Army reservist whose contact with the Army had occurred in California but whose "nominal commanding officer" was at a record-keeping center in Indiana. *Id.* at 342, 92 S. Ct. 1693. The Court recognized its prior holding "in

Schlanger that the presence of the 'custodian' within the territorial jurisdiction of the District Court was a sine qua non," *id.* at 343, 92 S. Ct. 1693, but added: "The jurisdictional defect in *Schlanger*, however, was not merely the physical absence of the Commander of Moody AFB from the District of Arizona, but the total lack of formal contacts between Schlanger and the military in that district," *id.* at 344, 92 S. Ct. 1693. Referring to Strait's commanding officer in Indiana, the Court said:

> Strait's situation is far different. His nominal custodian, unlike Schlanger's, has enlisted the aid and directed the activities of armed forces personnel in California in his dealings with Strait. Indeed, in the course of Strait's enlistment, virtually every face-to-face contact between him and the military has taken place in California. In the face of this record, to say that Strait's custodian is amenable to process only in Indiana—or wherever the Army chooses to locate its recordkeeping center—would be to exalt fiction over reality.

Id. (citation omitted). The Court concluded that "Strait's commanding officer is 'present' in California through the officers in the hierarchy of command who processed this serviceman's application for discharge." *Id.* at 345, 92 S. Ct. 1693. Further, the Court cited and explicitly endorsed in *Strait*, *id.* at 344-45, 92 S. Ct. 1693, the Second Circuit's decision in *Arlen* v. *Laird*, 451 F.2d 684 (2d Cir. 1971), where that Court permitted a petition to be filed in New York by an inactive reservist residing there, even though his nominal commanding officer was located in Indiana. The Second Circuit rejected what it called the "limited interpretation of *Schlanger*," *id.* at 686, and concluded that

Schlanger did not preclude a district court "with jurisdiction over the territory in which an unattached reservist is in custody and in which he reside and works, from entertaining his petition for habeas corpus solely because his nominal 'commanding officer' is not physically present in the jurisdiction," *id.* Thus, in *Strait*, instead of focusing on whether the custodian was physically present within the district, the Court looked at the contacts the custodian had with the district.

Further, in *Strait*, the Court relegated to a footnote the issue of whether such "presence" could suffice for personal jurisdiction, calling that conclusion "well settled." *Id.* at 346 n.2, 92 S. Ct. 1693.

The government would read narrowly the Court's reference in *Braden* to service of process, when it said that, "[s]o long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction'," *Braden*, 410 U.S. at 495, 93 S. Ct. 1123 (quoting 28 U.S.C. § 2241(a)), by referring to the concluding lines of the case:

> Since the petitioner's absence from the Western District of Kentucky did not deprive the court of jurisdiction, and since the respondent was properly served in that district, see *Strait* v. *Laird*, 406 U.S. 341, 92 S. Ct. 1693, 32 L.Ed.2d 141 (1972); *Schlanger* v. *Seamans*, 401 U.S. 487, 91 S. Ct. 995, 28 L.Ed.2d 251 (1971), the court below erred in ordering the dismissal of the petition on jurisdictional grounds.

Id. at 500, 93 S. Ct. 1123. The government reads the phrase, "the respondent was properly served in that district" to mean that *Braden's* reference to reaching a custodian through service of process did not "contemplate service outside a district court's territorial

jurisdiction." (Respondents' Reply in Supp. of Mot. to Dismiss Am. Pet. at 22) However, the *Braden* Court cited both *Schlanger* and *Strait* as authority to support the statement that "respondent was properly served in that district." Obviously, that respondent in *Braden* was properly served within the district where that case was filed was *sufficient* to confer personal jurisdiction, but *Strait*, which the *Braden* Court itself also cites, shows that it was not also *necessary*.

The government cites language in several cases in the First, Sixth, Eighth, Ninth and District of Columbia Circuits, some of which have already been discussed above, to the effect that a respondent in a habeas corpus case must be physically present within the district where the petition is brought.[8] I have examined those cases, which involve either the usual prisoner habeas scenario treated above, or otherwise fit comfortably within the pattern of the other cases discussed above. I do not believe any of them read on the facts present here, and it would lengthen this already lengthy opinion unduly to distinguish each of them in detail. For the above reasons, as I read *Braden*, there is nothing in 28 U.S.C. § 2241(a) to prevent this court from exercising jurisdiction over Padilla's petition, particularly if New York's long-arm statute authorizes such exercise. For

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[8] Those cases are: *Malone* v. *Calderon*, 165 F.3d 1234, 1237 (9th Cir. 1999); *Yi* v. *Maugans*, 24 F.3d 500, 507 (3d Cir. 1994); *Dunne* v. *Henman*, 875 F.2d 244, 249 (9th Cir. 1989); *Monk*, 793 F.2d at 369; *Guerra*, 786 F.2d at 417; *Wright* v. *United States Bd. of Parole*, 557 F.2d 74, 77 (6th Cir. 1977); *Gravink* v. *United States*, 549 F.2d 1152, 1154 (8th Cir. 1977); *United States* v. *Clinkenbeard*, 542 F.2d 59, 60 (8th Cir. 1976); *United States* v. *DiRusso*, 535 F.2d 673, 676 (1st Cir. 1976); *Lee* v. *United States*, 501 F.2d 494, 501 (8th Cir. 1974); *Sholars* v. *Matter*, 491 F.2d 279, 281 (9th Cir. 1974); *United States* v. *Sparrow*, 463 F.2d 1215, 1216 (7th Cir. 1972).

the same reasons, I believe this reading is confirmed by *Henderson*. To the extent any of the out-of-circuit cases the government cites may bear on this case, such authority is to be treated as persuasive but not binding, *see, e.g.*, *Pireno* v. *N.Y. State Chiropractic Ass'n.*, 650 F.2d 387, 395 n.13 (2d Cir. 1981), and, for the above reasons, I respectfully differ from the reasoning in any such cases.

C. *Personal Jurisdiction*

The question of whether New York's long-arm statute, N.Y. C.P.L.R. § 302(a)(1) (McKinney 1990), reaches Secretary Rumsfeld is not complex. That section permits a court in New York to exercise personal jurisdiction, "[a]s to a cause of action arising from any of the acts enumerated" therein, "over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state." *Id.* The statute's "reference to 'business' is read broadly as 'purposeful activities,' without any limitation to commercial transactions." *Perez*, 2000 WL 686369, at *3 (citing *Madden* v. *International Ass'n of Heat and Frost Insulators and Asbestos Workers*, 889 F. Supp. 707, 710 (S.D.N.Y. 1995)). Section 302(a)(1) is a "single act statute": only one transaction is needed to confer jurisdiction, so long as the defendant's activities were purposeful and there is a substantial relationship between those activities and the claim in suit. *See Kreutter* v. *McFadden Oil Corp.*, 71 N.Y.2d 460, 467, 527 N.Y.S.2d 195, 198-99, 522 N.E.2d 40 (1988). Here, Secretary Rumsfeld was directed by the President on June 9 to take custody of Padilla, and, as noted, the government has acknowledged that agents of the Department of Defense came into this district that day and did so. (Tr. of 6/11/02 at 7; *see also* Tr. of 7/31/02 at

17) That conduct, through agents, is sufficient to confer jurisdiction over Secretary Rumsfeld. There is no denial of due process in finding personal jurisdiction under these circumstances.

D. *Transfer to South Carolina*

The government has moved in the alternative to transfer this case to the District of South Carolina. The principal arguments for transfer relate to issues already covered—principally, who is the proper respondent and whether this court has jurisdiction over that respondent and otherwise can hear this case. Those issues have been resolved in a way that favors keeping the case here.

Further, Padilla's lawyers are here, and Newman was here working to secure his release before he was taken to South Carolina. As a result of his having sent his agents into this district to take custody of Padilla, the Secretary can be reached through process issued by this court. Thus, he too is, in a legal if not quite a physical sense, here. Commander Marr is not here, but for reasons already explained there is no need that she be present in the jurisdiction where the action is pending. For current purposes, the Secretary will suffice. It may be, as set forth below, that it will be necessary for counsel to confer briefly with Padilla, which would entail a trip to South Carolina. However, as between taking a brief trip to South Carolina to confer with their client, and litigating the case in South Carolina, the convenience of counsel is served by keeping the case here. Insofar as the above cases suggest that considerations of convenience and practicality are relevant, *see Henderson*, 157 F.3d at 122, those considerations are served by keeping the case here.

The government's motion to transfer the case to South Carolina therefore is denied.

IV. THE LAWFULNESS OF PADILLA'S DETENTION

The basic question dividing the parties is whether Padilla is lawfully detained. Like the question of whether this court has jurisdiction, that basic question unfolds into subsidiary questions: Does the President have the authority to designate as an enemy combatant an American citizen captured on American soil, and, through the Secretary of Defense, to detain him for the duration of armed conflict with al Qaeda? If so, can the President exercise that authority without violating 18 U.S.C. § 4001(a),[9] which bars the detention of American citizens "except pursuant to an Act of Congress"? 18 U.S.C. § 4001(a) (2000). If so, by whatever standard

[9] Padilla argues also that his detention by the military violates the Posse Comitatus Act, codified at 18 U.S.C. § 1385. That statute makes it unlawful to use the military "as a posse comitatus or otherwise to execute the laws." First, it is questionable whether that statute is enforceable in a habeas corpus proceeding to secure release from custody. *Cf. Robinson* v. *Overseas Military Sales Corp.*, 21 F.3d 502, 511 (2d Cir. 1994) (no private right of action to enforce Posse Comitatus Act). Moreover, the statute bars use of the military in civilian law enforcement. *See United States* v. *Mullin*, 178 F.3d 334, 342 (5th Cir. 1999) ("The [Posse Comitatus] Act is designed to restrict military involvement in civilian law enforcement."). Padilla is not being detained by the military in order to execute a civilian law or for violating a civilian law, notwithstanding that his alleged conduct may in fact violate one or more such laws. He is being detained in order to interrogate him about the unlawful organization with which he is said to be affiliated and with which the military is in active combat, and to prevent him from becoming reaffiliated with that organization. Therefore, his detention by the military does not violate the Posse Comitatus Act.

this court must apply—itself a separate issue—is the evidence adduced by the government sufficient to justify the detention of Padilla? As was true of the questions underlying the issue of jurisdiction, each of those questions subsumes its own set of questions.

For the reasons set forth below, the answer to the first two of those questions is yes; a definitive answer to the third of those questions must await a further submission from Padilla, should he choose to make one, although the court will examine only whether there was some evidence to support the President's finding, and whether that evidence has been mooted by events subsequent to Padilla's detention.

A. *The President's Authority To Order That Padilla Be Detained As An Enemy Combatant*

Neither Padilla nor any of the amici denies directly the authority of the President to order the seizure and detention of enemy combatants in a time of war. Rather, they seek to distinguish this case from cases in which the President may make such an order on the grounds that this is not a time of war, and therefore the President may not use his powers as Commander in Chief or apply the laws of war to Padilla, and that Padilla in any event must be treated differently because he is an American citizen captured on American soil where the courts are functioning.

The claim by petitioner and the amici that this is not a time of war has two prongs: First, because Congress did not declare war on Afghanistan, the only nation state against which United States forces have taken direct action, the measures sanctioned during declared wars, principally in *Ex Parte Quirin*, 317 U.S. 1, 63 S. Ct. 1, 87 L.Ed. 3 (1942), discussed below, are not avail-

able here. Second, because the current conflict is with al Qaeda, which is essentially an international criminal organization that lacks clear corporeal definition, the conflict can have no clear end, and thus the detention of enemy combatants is potentially indefinite and therefore unconstitutional. For the reasons discussed below, neither prong of the argument withstands scrutiny.

The first prong of the argument—that we are not in a war and that only Congress can declare war—does not engage the real issue in this case, which concerns what powers the President may exercise in the present circumstances. Even assuming that a court can pronounce when a "war" exists, in the sense in which that word is used in the Constitution, *cf. Bas* v. *Tingy*, 4 U.S. (4 Dall.) 37, 42, 1 L.Ed. 731 (1800) (determining whether France, with which the United States had engaged in an undeclared naval war, was an "enemy" within the meaning of a prize statute, but noting that whether there was a war in a constitutional sense was irrelevant: "Besides, it may be asked, why should the rate of salvage be different in such a war as the present, from the salvage in a war more solemn [*i.e.*, declared] or general?"), a formal declaration of war is not necessary in order for the executive to exercise its constitutional authority to prosecute an armed conflict—particularly when, as on September 11, the United States is attacked. In *The Prize Cases*, 67 U.S. (2 Black) 635, 17 L.Ed. 459 (1862), the Supreme Court rejected a challenge to the President's authority to impose a blockade on the secessionist states—an act of war—when there had been no declaration of war. The Court acknowledged that the President "has no power to initiate or declare a war." *Id.* at 668, 2 Black 635. However, the Court recognized also that "war may exist without a

declaration on either side," *id.*, and that when the acts of another country impose a war on the United States, the President "does not initiate that war, but is bound to accept the challenge without waiting for any special legislative authority," *id.* The Court made it plain that what military measures were necessary was a political and not a judicial decision: "Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by *him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." *Id.* at 670, 2 Black 635. It was the President, and not the Court, who:

> must determine what degree of force the crisis demands. The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

Id. Here, I agree completely with Judge Silberman who, after examining and quoting from *The Prize Cases*, wrote as follows:

> I read the *Prize Cases* to stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected.

Campbell v. *Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring); *see also Johnson* v. *Eisentrager*, 339 U.S. 763, 789, 70 S. Ct. 936, 94 L.Ed. 1255

(1950) ("Certainly it is not the function of the Judiciary to entertain private litigation . . . which challenges the legality, wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); *Freeborn* v. *The Protector*, 79 U.S. (12 Wall.) 700, 702, 20 L.Ed. 463 (1871) (treating executive proclamations as conclusive evidence of when the Civil War began and ended); *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 30, 6 L.Ed. 537 (1827) (Story, J.) ("We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons.").

The conclusion that the President may exercise his powers as Commander in Chief without a declaration of war is borne out not only by legal precedent, but also by even the briefest contemplation of our history. When one considers the sheer number of military campaigns undertaken during this country's history, declarations of war are the exception rather than the rule, beginning with the undeclared but Congressionally authorized naval war against France in the 1790's referred to in *Bas* v. *Tingy*, cited above. Taking into account only the modern era, the last declared war was World War II. Since then, this country has fought the Korean War, the Viet Nam War, the Persian Gulf War, and the Kosovo bombing campaign, as well as other military engagements in Lebanon, Haiti, Grenada and Somalia, to cite a random and by no means exhaustive list, with no appellate authority holding that a declaration of war was necessary. When confronted with challenges to the Viet Nam War, several appellate courts held specifically that no declaration of war was necessary. *See, e.g.*, *Mitchell* v. *Laird*, 488 F.2d 611,

613-14 (D.C. Cir. 1973); *Com. of Massachusetts* v. *Laird*, 451 F.2d 26, 31-32 (1st Cir. 1971); *Orlando* v. *Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971).

Further, even if Congressional authorization were deemed necessary, the Joint Resolution, passed by both houses of Congress, authorizes the President to use necessary and appropriate force in order, among other things, "to prevent any future acts of international terrorism against the United States," and thereby engages the President's full powers as Commander in Chief. Authorization for Use of Military Force § 2(a).

The laws of war themselves, which the President has invoked as to Padilla, apply regardless of whether or not a war has been declared. What is sometimes referred to as the Third Geneva Convention—Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, to which the United States is a party and which therefore under the Supremacy Clause has the force of domestic law,[10] states that it applies, "to all cases of declared war or any other state of armed conflict." GPW, art. 2.

The question of when the conflict with al Qaeda may end is one that need not be addressed. So long as American troops remain on the ground in Afghanistan and Pakistan in combat with and pursuit of al Qaeda fighters, there is no basis for contradicting the President's repeated assertions that the conflict has not ended. *See Ludecke* v. *Watkins*, 335 U.S. 160, 167-69, 68

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[10] *See* U.S. Const. Art. VI, § 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land . . . .").

S. Ct. 1429, 92 L.Ed. 1881 (1948) (deferring to the President's position that a state of war continued to exist despite Germany's surrender to the Allies). At some point in the future, when operations against al Qaeda fighters end, or the operational capacity of al Qaeda is effectively destroyed, there may be occasion to debate the legality of continuing to hold prisoners based on their connection to al Qaeda, assuming such prisoners continue to be held at that time. *See id.* at 169, 68 S. Ct. 1429 ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.").

To the extent petitioner and the amici are suggesting that because the period of Padilla's detention is, at this moment, indefinite, it is therefore perpetual, and therefore illegal, the argument is illogical. Moreover, insofar as the argument assumes that indefinite confinement of one not convicted of a crime is *per se* unconstitutional, that assumption is simply wrong. In *Kansas* v. *Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997), the Court upheld Kansas's Sexually Violent Predator Act, providing for civil commitment of those who, due to "mental abnormality" or "personality disorder" are likely to commit sexually predatory acts. Rejecting the argument that the statute imposed criminal sanctions in the guise of a civil remedy, the Court noted that "commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." *Id.* at 361-62, 117 S. Ct. 2072. The Court found that the statute was not retributive "because it does not affix culpability for prior criminal conduct," *id.* at 362, 117 S.

Ct. 2072, and that it was not intended as a deterrent because the targets of the statute were "unlikely to be deterred by the threat of confinement," *id.* at 362-63, 117 S. Ct. 2072. *See also United States* v. *Salerno*, 481 U.S. 739, 748, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987) ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war and insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous."); *Moyer* v. *Peabody*, 212 U.S. 78, 84, 29 S. Ct. 235, 53 L.Ed. 410 (1909) (upholding the detention of a union president without charge during an insurrection, reasoning: "Such arrests are not necessarily for punishment but are by way of precaution, to prevent the exercise of hostile power"). To be sure, the standard of proof in some of those cases may well have been higher than the standard ultimately will be found to be in this case, but the point is that there is no *per se* ban.

The Court recently raised constitutional doubts as to the permissible length of preventive detention when it considered a case involving aliens awaiting deportation, and therefore read the governing statute to limit such detention to the time reasonably necessary to secure the alien's removal, with six months presumed as a reasonable limit. *Zadvydas* v. *Davis*, 533 U.S. 678, 691-97, 701, 121 S. Ct. 2491, 150 L.Ed.2d 653 (2001). However, even while doing so, the Court was careful to point out that the case before it did not involve "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the

judgments of the political branches with respect to matters of national security." *Id.* at 696, 121 S. Ct. 2491.

Further, the notion that a court must be able now to define conditions under which the current conflict will be declared to be over, and presumably open its doors to parties who may wish to litigate before the fact what those conditions might be, defies the basic concept of Article III jurisdiction. Federal courts, it will be recalled, are not permitted to deal with any but actual "cases" and "controversies," U.S. Const., art. III, § 2, as opposed to those disputes that live only on the agendas of interested parties. When and if the time comes that Padilla can credibly claim that he has been detained too long, whether due to the sheer duration of his confinement or the diminution or outright cessation of hostilities, the issue of how and whether such a claim can be adjudicated will have to be faced. I do not understand Padilla to be making that claim now, and therefore see no need to face that issue now.

Padilla and the amici challenge the President's authority to declare him an enemy combatant, and to apply to him the laws of war, citing his American citizenship and his capture on American soil at a time when the courts were functioning. Before examining directly the issue of the President's authority, it is necessary to examine what the designation "enemy combatant" means in this case. The laws of war draw a fundamental distinction between lawful and unlawful combatants. Lawful combatants may be held as prisoners of war, but are immune from criminal prosecution by their captors for belligerent acts that do not constitute war crimes. *See United States* v. *Lindh*, 212

F. Supp. 2d 541, 553 (E.D. Va. 2002) (citing numerous authorities); GPW, art. 87.

Four criteria generally determine the conditions an armed force and its members must meet in order to be considered lawful combatants:

> (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of War.

Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, Annex art. 1, 36 Stat. 2277, T.S. No. 539 (Jan. 26, 1910) (the "Hague Convention" and the "Hague Regulations"). Those who do not meet those criteria, including saboteurs and guerrillas, may not claim prisoner of war status. *See Quirin*, 317 U.S. at 31, 63 S. Ct. 1 (citing authorities for the proposition that unlawful combatants are "offenders against the law of war" and may be tried by military tribunals).

The Third Geneva Convention, referred to above, reaffirmed the distinction between lawful and unlawful combatants. Article 4 of that treaty uses the same standards as the Hague Regulations for distinguishing who must be treated as a prisoner of war from who enjoys no such protection. *See* GPW, art. 4(2). Although in the past unlawful combatants were often summarily executed, such Draconian measures have not prevailed in modern times in what some still refer to without embarrassment as the civilized world. *See* Manual of Military Law 242 (British War Office 1914) ("No law authorizes [officers] to have [any disarmed enemy] shot without trial; and international law forbids

summary execution absolutely.").[11] Rather, as recognized in *Quirin*, unlawful combatants generally have been tried by military commissions. *Quirin*, 317 U.S. at 35, 63 S. Ct. 1. They are not entitled to prisoner of war status, either as a matter of logic or as a matter of law under the Third Geneva Convention. It is not that the Third Geneva Convention authorizes particular treatment for or confinement of unlawful combatants; it is simply that that convention does not protect them.

Although unlawful combatants, unlike prisoners of war, may be tried and punished by military tribunals, there is no basis to impose a requirement that they be punished. Rather, their detention for the duration of hostilities is supportable—again, logically and legally—on the same ground that the detention of prisoners of war is supportable: to prevent them from rejoining the enemy. Under the Third Geneva Convention, the recognized purpose of confinement during an

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[11] However, when they did prevail, in the practices of German troops during World War II, who often shot partisans summarily, certain of those tried after that war were found to have a valid defense based on the unlawful status of their victims. In one trial of Axis officials accused of murdering captured partisans in the Balkans, the Court wrote: "The [partisan] bands . . . with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements [for lawful combatant status]. This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs [another term for unlawful combatants, dating from the Franco-Prussian War, when irregular French fighters captured by Prussian soldiers were summarily executed]." *The Hostages Trial: Trial of Wilhelm List and Others* (Case No. 47), 8 L. Rpts. of Trials of War Criminals 34, 57 (U.N. War Crimes Comm'n 1948).

ongoing conflict is "to prevent military personnel from taking up arms once again against the captor state." ICRC, *Commentary on the Geneva Conventions of 12 August 1949, Geneva Convention III Relative to the Treatment of Prisoners of War* 547 (1960). Thus, Article 118 of the Third Geneva Convention provides, as to release of prisoners, only that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." GPW, art. 118.

As noted, in the June 9 Order, the President designated Padilla an "enemy combatant" based on his alleged association with al Qaeda and on an alleged plan undertaken as part of that association. *See supra* pp. [84a-85a]. The point of the protracted discussion immediately above is simply to support what should be an obvious conclusion: when the President designated Padilla an "enemy combatant," he necessarily meant that Padilla was an unlawful combatant, acting as an associate of a terrorist organization whose operations do not meet the four criteria necessary to confer lawful combatant status on its members and adherents. *See* Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 Am. J. Int'l L. 328, 335 (2002) ("Al Qaeda has failed to fulfill four prerequisites of lawful belligerency."); *see also Quirin*, 317 U.S. at 31, 63 S. Ct. 1 (describing an unlawful combatant as, *inter alia*, one "who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property"). Indeed, even the Taliban militia, who appear at least to have acted in behalf of a government in Afghanistan, were found by Judge Ellis in *Lindh* not to qualify for lawful combatant status. *Lindh*, 212 F. Supp. 2d at 557-58.

That brings us to the central issue presented in this case: whether the President has the authority to designate as an unlawful combatant an American citizen, captured on American soil, and to detain him without trial. Padilla and the amici argue that, regardless of what treatment is permitted under the Third Geneva Convention and otherwise for unlawful combatants, the Constitution forbids indefinite detention of a citizen captured on American soil so long as "the courts are open and their process unobstructed," *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121, 18 L.Ed. 281 (1866). Padilla relies heavily on *Milligan*, a Civil War-era case in which Milligan was one of a group arrested in Indiana and tried before a military commission on a charge of conspiring against the United States by planning to seize weapons, free Confederate prisoners, and kidnap the governor of Indiana. Convicted and sentenced to death, he filed a habeas corpus petition challenging the jurisdiction of the military commission to try him. The Court set aside the conviction, declaring that the "[laws of war] can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." *Id.* The Court found that the military commission had unlawfully usurped the judicial function, *id.*, reasoning that although the President had the power to suspend the writ of habeas corpus during the Civil War, all other rights remained intact, even in wartime. The Framers, the Court found, "limited the [power of] suspension to one great right [*i.e.*, the right to petition for habeas corpus], and left the rest to remain forever inviolable." *Id.* at 126, 4 Wall. 2.

Milligan, however, received a narrow reading in *Quirin*, a case on which the government, not surprisingly, places heavy reliance. Petitioners in *Quirin* were German saboteurs put ashore in June 1942, during World War II, in two groups, from submarines off Amagansett, a village on Long Island, New York, and off Ponte Vedra Beach, Florida. They landed wearing German uniforms, which they quickly buried, and changed into civilian dress.[12] They intended to sabotage war industries and facilities in the United States, but were arrested before their plans ripened into action. *See Quirin*, 317 U.S. at 21, 63 S. Ct. 1. One of the saboteurs, Haupt, claimed United States citizenship, which the government disputed; the Court found the issue immaterial. Rather, the Court found that Haupt's belligerent status distinguished him from Milligan, noting that "the [*Milligan*] Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states of rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or

[12] At first glance, it seems nearly perverse that the saboteurs, whose mission not only did not require uniforms but could be betrayed by them, would nonetheless land in uniforms and thereby impose on one of the most dangerous parts of the mission—the landing—when they were most vulnerable to detection, the time-consuming and complicated steps of having to change into civilian clothes and bury the uniforms. In fact, it was not perverse at all. Rather, it seems clear that those who organized the mission well understood the rules of war, and understood also that if the saboteurs were captured during the landing, when they were particularly vulnerable to detection, and were not wearing uniforms, they would have no hope of being classified as lawful combatants. The uniforms provided at least a measure of protection for the saboteurs against unlawful combatant status if they were captured during the landing. *See supra* pp. [127a-129a] and authority cited therein.

subject to the penalties imposed upon unlawful belligerents." *Id.* at 45, 63 S. Ct. 1. The Court continued:

> We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established.

Id. Because the *Quirin* Court found that the German saboteurs were not only attempting to harm the United States during an armed conflict but doing so as persons associated with an enemy's armed forces, the Court concluded that the saboteurs, unlike Milligan, could be treated as unlawful combatants. Padilla, like the saboteurs, is alleged to be in active association with an enemy with whom the United States is at war.

Although the particular issue before the Court in *Quirin*—whether those petitioners could be tried by a military tribunal—is not precisely the same as the one now before this court—whether Padilla may be held without trial, the logic of *Quirin* bears strongly on this case. First, *Quirin* recognized the distinction between lawful and unlawful combatants, and the different treatment to which each is potentially subject:

> By universal agreement and practice the law of war draws a distinction between . . . lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in

> addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

Id. at 30-31, 63 S. Ct. 1. Second, if we revisit the last sentence quoted above, it appears that the Court touched directly on the subject at issue in this case when it said that "[u]nlawful combatants are likewise subject to capture *and detention*," *id.* at 31, 63 S. Ct. 1 (emphasis added). Although the issue of detention alone was not before the Court in *Quirin*, I read the quoted sentence to mean that as between detention alone, and trial by a military tribunal with exposure to the penalty actually meted out to petitioners in *Quirin* —death—or, at the least, exposure to a sentence of imprisonment intended to punish and deter, the Court regarded detention alone, with the sole aim of preventing the detainee from rejoining hostile forces—a consequence visited upon captured lawful combatants—as certainly the lesser of the consequences an unlawful combatant could face. If, as seems obvious, the Court in fact regarded detention alone as a lesser consequence than the one it was considering—trial by military tribunal—and it approved even that greater consequence, then our case is *a fortiori* from *Quirin* as regards the lawfulness of detention under the law of war.' *See also Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (American citizen who entered the United States to commit hostile acts in aid of Germany during World War II could be tried by military commission: "[B]oth the executive and judicial branches of the government have recognized a clear distinction between a lawful combatant subject to capture and detention as a prisoner of war, and an unlawful combatant, *also subject to capture and detention*, but in

addition 'subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.'") (citing *Quirin*, 317 U.S. at 31, 63 S. Ct. 1) (emphasis added)); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (American citizen captured in Sicily while serving in enemy army could be held as prisoner of war in California for duration of hostilities).

Quirin spoke to the issue of Presidential authority as well, albeit obliquely, and not as Padilla and the amici would have me read that case. They argue that when the Court wrote that the Constitution "invests the President . . . with the power to wage war which Congress has declared," *id.* at 26, 63 S. Ct. 1, that was meant to confine the holding in that case to formally declared wars, such as World War II, and means that *Quirin* is irrelevant to this case. However, the logic of that argument requires a finding that *Quirin sub silentio* overruled the *The Prize Cases*, discussed at pages [120a-121a] above. That breathtaking conclusion is unwarranted, however, both because it is unreasonable to believe that the Court would deal so casually with its own significant precedents, and because, as noted above, *The Prize Cases* have been found authoritative since *Quirin*, and appear to be very much alive.

The *Quirin* Court found it "unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions." *Quirin*, 317 U.S. at 29, 63 S. Ct. 1. However, the Court did suggest that the President's decision to try the saboteurs before a military tribunal

rested at least in part on an exercise of Presidential authority under Article II of the Constitution:

> By his order creating the present Commission [the President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

Id. at 28, 63 S. Ct. 1.

Here, the basis for the President's authority to order the detention of an unlawful combatant arises both from the terms of the Joint Resolution, and from his constitutional authority as Commander in Chief as set forth in *The Prize Cases* and other authority discussed above. Also as discussed above, no principle in the Third Geneva Convention impedes the exercise of that authority.

B. *Is Padilla's Detention Barred by Statute?*

Whatever may be the President's authority to act in the absence of a specific limiting legislative enactment, Padilla and the amici argue that 18 U.S.C. § 4001(a) bars his confinement in the circumstances present here, and the ACLU argues that Padilla's confinement is barred as well by the USA Patriot Act, Pub.L. No. 107-56, 115 Stat. 272 (2001) (the "Patriot Act"). However, as set forth below, § 4001(a), which by its terms applies to Padilla, bars confinement only in the absence of congressional authorization, and there has been congressional authorization here; the Patriot Act simply does not bear on this case.

Taking the second argument first, the Patriot Act permits the detention of aliens suspected of activity endangering the security of the United States, for a period limited to seven days. *See* 8 U.S.C. § 1226A(a)(5) (2000). According to the ACLU, had Congress thought that American citizens or even aliens could be detained as enemy combatants, it would never have passed this provision of the Patriot Act. (*See* ACLU Br. at 8-9) The Patriot Act, however, cannot be read as a comprehensive guide to presidential powers under the Joint Resolution. Because the Patriot Act requires only that the Attorney General have a reasonable ground to believe that an alien is engaging in threatening activity, *id.* § 1126A(a)(3), that Act can be applied to persons who could not be classified as enemy combatants under the law of war. *See Quirin*, 317 U.S. at 45, 63 S. Ct. 1 (acknowledging that a citizen may not be tried by military tribunal if he is not serving a recognized enemy); discussion at page [127a], above. The cited portion of the Patriot Act applies to persons as to whom there is alleged to be far less reason for suspicion than there is as to Padilla. Moreover, to accept the ACLU's reading of the cited portion of the Patriot Act is to read that statute as having been intended to undercut substantially the logic of *Quirin*. I refuse to read the statute to accomplish such a stark result.

Padilla's principal statutory argument is based on 18 U.S.C. § 4001(a), which is broad and categorical:

> No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

18 U.S.C. § 4001(a) (2000); *see Howe* v. *Smith*, 452 U.S. 473, 480 n.3, 101 S. Ct. 2468, 69 L.Ed.2d 171 (1981)

("[T]he plain language of § 4001(a) proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain.") (emphasis in original).

To avoid the reach of that statute, the government appears to lean heavily on statutory construction arguments that fail to confront the plain language of the statute, and to rest rather lightly on what seems to me the more persuasive position: that Padilla in fact is detained "pursuant to an Act of Congress." Thus, the government argues that reading § 4001(a) to cover Padilla's detention would bring that section in conflict with Article II, section 2, clause 1 of the Constitution, which makes the President "Commander in Chief of the Army and Navy of the United States," U.S. Const., art. 2, § 2, cl. 1, and has been interpreted to grant the President independent authority to respond to an armed attack against the United States. *See The Prize Cases*, 67 U.S. at 668, 2 Black 635 ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority."); *see also Hamdi* v. *Rumsfeld*, 296 F.3d at 281-82 ("The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section II."); *Campbell* 203 F.3d at 27 (Silberman, J., concurring) (collecting authorities for the proposition that "the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization").

The government suggests that because reading the statute to impinge on the President's Article II powers, including detention of enemy combatants, creates a danger that the statute might be found unconstitutional

as applied to the present case, a court should read the statute so as not to cover detention of enemy combatants, applying the canon that a statute should be read so as to avoid constitutional difficulty. *See, e.g.*, *Jones* v. *United States*, 529 U.S. 848, 857, 120 S. Ct. 1904, 146 L.Ed.2d 902 (2000) (citing "the guiding principle that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'") (quoting *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408, 29 S. Ct. 527, 53 L.Ed. 836 (1909)).

However, this doctrine of constitutional avoidance "'has no application in the absence of statutory ambiguity.'" *HUD* v. *Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 1235, 152 L.Ed.2d 258 (2002) (quoting *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494, 121 S. Ct. 1711, 149 L.Ed.2d 722 (2001)). Any other approach, as pointed out in *Rucker*, "'while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution.'" *Id.* at 1235-36 (quoting *United States* v. *Albertini*, 472 U.S. 675, 680, 105 S. Ct. 2897, 86 L.Ed.2d 536 (1985)). That is, if a court read an ambiguity into an unambiguous statute simply for the purpose of avoiding an adverse decision as to the constitutionality of that statute, the court would be exercising legislative powers and thereby usurping those powers. There is no ambiguity here. The plain language of the statute encompasses all detentions of United States citizens. Therefore, the constitutional avoidance canon cannot affect how the statute is read.

The government argues also that because § 4001(a) is in Title 18 of the United States Code, and that title governs "Crimes and Criminal Procedure," Congress could not have intended to impede the President's authority to use the military rather than the civilian law enforcement arm of the government to detain unlawful combatants in wartime. The government proffers, as additional textual evidence, that 18 U.S.C. § 4001(b) gives the Attorney General control over "Federal penal and correctional institutions, except military or naval institutions," 18 U.S.C. § 4001(b) (2000), and reasons that this shows that Congress meant to exclude military detention from the reach of the section. However, § 4001(b) simply limits the Attorney General's responsibility for prisons to those that are not run by the military. The placement of this section within Title 18 is entirely natural because most detentions result from arrest by law enforcement agencies. This textual argument, too, cannot overcome the plain language of the statute, as read by the Supreme Court in *Howe* v. *Smith*, cited above.

Although the government struggles unsuccessfully to avoid application of the statute, the government is on firmer ground when it argues that even if § 4001(a) applies, its terms have been complied with. The statute permits detention of an American citizen "pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (2000). If the Military Force Authorization passed and signed on September 18, 2001, is an "Act of Congress," and if it authorizes Padilla's detention, then perforce the statute has not been violated here.

The Joint Resolution is not called an "Act," but that is the only respect in which it is not an "Act." Joint resolutions generally, as their name would suggest,

require the approval of both Houses of Congress, and if signed by the President, have the force of law. *See Bowsher* v. *Synar*, 478 U.S. 714, 756, 106 S. Ct. 3181, 92 L.Ed.2d 583 (1986) ("The joint resolution, which is used for 'special purposes and . . . incidental matters,' makes binding policy and 'requires an affirmative vote by both Houses and submission to the President for approval'—*the full Article I requirements*." (emphasis added) (citation omitted)). That is to say, there is no relevant constitutional difference between a bill and a joint resolution; both require bicameralism—passage by both Houses, and presentment—submission to the President for signature.

Congress itself has intimated that a joint resolution qualifies as an "Act of Congress." *See* Joint Resolution of Dec. 15, 1981, Pub.L. No. 97-92, § 140, 95 Stat. 1183, 1200 ("Notwithstanding any other provision of law . . . none of the funds appropriated by this joint resolution *or by any other* Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted." (emphasis added)). A light smattering of cases suggests the same thing. *See Acme of Precision Surgical Co.* v. *Weinberger*, 580 F. Supp. 490, 501-02 (E.D. Pa. 1984) (calling joint resolutions "acts of Congress"); *Louisville & Nashville R.R.* v. *Bass*, 328 F. Supp. 732, 739 (W.D. Ky. 1971) (equating a joint resolution with an "Act of Congress"); *Berk* v. *Laird*, 317 F. Supp. 715, 723 (E.D.N.Y. 1970) (calling the Gulf of Tonkin Resolution an "act of Congress").

Principally because the Joint Resolution complies with all constitutional requirements for an Act of Con-

gress, it should be regarded for purposes of § 4001(a) as an "Act of Congress." *Cf. Hamdi*, 296 F.3d at 281 (concluding that the President acted with statutory authorization in designating Hamdi, an American citizen captured in Afghanistan, as an enemy combatant).

The authority conferred by the Joint Resolution itself is broad. It authorizes the President to "use all necessary and appropriate force against those . . . organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such . . . organizations or persons." Authorization for Use of Military Force, Pub. Law No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). This language authorizes action against not only those connected to the subject organizations who are directly responsible for the September 11 attacks, but also against those who would engage in "future acts of international terrorism" as part of "such . . . organizations." *Id.* As reflected, *inter alia*, in the President's November 13, 2001 order establishing military tribunals, al Qaeda is an organization the President has determined committed the subject acts. Mil. Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001). Indeed, in the June 9 Order directing Padilla's detention, the President refers to al Qaeda as "an international terrorist organization with which the United States is at war." June 9 Order at ¶ 2. As discussed above, Padilla is alleged in the June 9 Order to have been an unlawful combatant in behalf of al Qaeda. Also as discussed extensively above, the Third Geneva Convention does not forbid detention of unlawful combatants. Accordingly, the detention of

Padilla is not barred by 18 U.S.C. § 4001(a); nor, as discussed above, is it otherwise barred as a matter of law.

V. CONSULTATION WITH COUNSEL

The government has not disputed Padilla's right to challenge his detention by means of a habeas corpus petition. Although Padilla has the ability, through his lawyer, to challenge the government's naked legal right to hold him as an unlawful combatant on any set of facts whatsoever, he has no ability to make fact-based arguments because, as is not disputed, he has been held incommunicado during his confinement at the Consolidated Naval Brig in Charleston, and has not been permitted to consult with counsel. Therefore, unless I find that the only fact issue Padilla has a right to be heard on is whether the government's proffered facts, taken alone and without right of response, are sufficient to warrant his detention by whatever evidentiary standard may apply—an argument that can be presented by counsel without access to Padilla—I must address the question of whether he may present facts, and how he may do so. As explained below: (i) Padilla does have the right to present facts; (ii) the most convenient way for him to go about that, and the way most useful to the court, is to present them through counsel; and (iii) the government's arguments are insufficient to warrant denying him access to counsel. Therefore, to the extent set forth below, Padilla will be permitted to consult with counsel in aid of prosecuting this petition.

Padilla's right to present facts is rooted firmly in the statutes that provide the basis for his petition. Padilla has petitioned pursuant to 28 U.S.C. § 2241, which,

among other things, grants to district courts the power to issue writs of habeas corpus; a related section, 28 U.S.C. § 2243, provides the skeletal outline of procedures to be followed in a § 2241 case. It includes the following:

> Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.
>
> The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

28 U.S.C. § 2243 (2000). A related section, 28 U.S.C. § 2246, allows the taking of evidence in habeas corpus cases by deposition, affidavit, or interrogatories.

Further, both the Federal Rules of Civil Procedure and the Rules Governing § 2254 Cases may be applied in § 2241 habeas corpus cases, in the discretion of the court. *See* Fed. R. Civ. P. 81(a)(2) (rules apply "to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and . . . has heretofore conformed to the practice in civil actions"); Rules Governing § 2254 Cases 1(b) (§ 2254 rules may apply in other habeas corpus cases "at the discretion of the United States district court"). This blend of procedures that may be applied makes a habeas corpus case different from the usual civil lawsuit. *See, e.g.*, *Harris* v. *Nelson*, 394 U.S. 286, 293-94, 89 S. Ct. 1082, 22 L.Ed.2d 281 (1969) ("It is, of course, true that habeas corpus proceedings are characterized as 'civil.' But that label is gross and inexact. Essentially, the proceeding is unique."). The Supreme Court has praised the flexi-

bility of habeas corpus. *See, e.g., Jones* v. *Cunningham*, 371 U.S. 236, 243, 83 S. Ct. 373, 9 L.Ed.2d 285 (1963) ("It is not now and never has been a static, narrow, formalistic remedy.").

Quite plainly, Congress intended that a § 2241 petitioner would be able to place facts, and issues of fact, before the reviewing court, and it would frustrate the purpose of the remedy to prevent him from doing so.

The habeas corpus statutes do not explicitly provide a right to counsel for a petitioner in Padilla's circumstances, but 18 U.S.C. § 3006A(2)(B) permits a court to which a § 2241 petition is addressed to appoint counsel for the petitioner if the court determines that "the interests of justice so require." 18 U.S.C. § 3006A(2)(B) (2000). I have already so determined, and have continued the appointment of Newman and appointed also Andrew Patel, Esq., as co-counsel.

Of course, Padilla has no Sixth Amendment[13] right to counsel in this proceeding. The Sixth Amendment grants that right to the "accused" in a "criminal proceeding"; Padilla is in the custody of the Department of Defense; there is no "criminal proceeding" in which Padilla is detained; therefore, the Sixth Amendment does not speak to Padilla's situation. Beyond the plain language of the Amendment, "even in the civilian community a proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from

[13] The Sixth Amendment to the Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const., amend. VI.

a traditional civilian criminal trial." *Middendorf* v. *Henry*, 425 U.S. 25, 38, 96 S. Ct. 1281, 47 L.Ed.2d 556 (1976). Such "elements" are present here—notably, that Padilla's detention "does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." *Hendricks*, 521 U.S. at 361-62, 117 S. Ct. 2072. Although *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L.Ed.2d 977 (1964), recognized a Sixth Amendment right against custodial interrogation without access to counsel, the remedy for violation of this right is exclusion of the fruits of the interrogation at a criminal trial, *id.* at 491, 84 S. Ct. 1758. There being no criminal proceeding here, Padilla could not enforce this right now even if he had it.

Nor does the self-incrimination clause of the Fifth Amendment[14] provide any more help to Padilla than the Sixth Amendment in his effort to confer with counsel. Although the Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), found in that clause a right to counsel, calling the presence of counsel "the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege," *id.* at 466, 86 S. Ct. 1602, and "[a]lthough conduct by law enforcement officials prior to trial may significantly impair that right [to avoid self-incrimination], a constitutional violation occurs only at trial." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S. Ct. 1056, 108 L.Ed.2d 222 (1990). That is of no help to Padilla, who does not face the prospect of a trial. *But see Martinez* v. *City of Oxnard*, 270 F.3d 852 (9th Cir. 2001) (holding

[14] That clause states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V.

that a plaintiff may bring a § 1983 action alleging a violation of Fifth and Fourteenth Amendment rights to be free from police coercion in pursuit of a confession even though statements were not used against him at trial), *cert. granted sub nom. Chavez* v. *Martinez*, 535 U.S. 1111, 122 S. Ct. 2326, 153 L.Ed.2d 158 (2002).

The Due Process Clause of the Fifth Amendment states that "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V. Professor Laurence Tribe has commented that, "[w]hat emerges from [the] disparate cases and lines of thought [interpreting the Due Process Clause] is, quite clearly, less than a solidly grounded or coherently elaborated right of judicial access." Laurence H. Tribe, *American Constitutional Law* §§ 10-18, at 759 (2d ed. 1988). Finding guidance in the due process clause would require, at a minimum, locating the delicate balance between private and public interests that is the test for finding a due process right, as set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S. Ct. 893. That is not to say that there are no guides whatever to striking that balance. There are. *See, e.g., Nat'l Council of Resistance of Iran* v. *Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001) (holding that organizations designated by the Secretary of State as terrorist organizations must have "the opportunity to be heard at a meaningful time and in a meaningful manner," and must have "the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations"). However, as explained below, the provisions and characteristics of the habeas corpus statute and remedy discussed at pages [143a-144a] above, and the court's power under the All Writs Act, 28 U.S.C. § 1651(a) (2000), to issue writs in aid of its jurisdiction, provide a statutory basis for decision. Considerations of prudence require that a court avoid a constitutional basis for decision when there exists a non-constitutional alternative. *See Harris* v. *McRae*, 448 U.S. 297, 306-07, 100 S. Ct. 2671, 65 L.Ed.2d 784 (1980) (cautioning that when a case can be decided based on either a statute or the Constitution, the statute should provide the basis for decision).

Part of that non-constitutional alternative lies in the provisions of the habeas corpus statute, and the characteristics of the remedy, discussed at pages [143a-144a] above, which make it clear that Congress intended habeas corpus petitioners to have an opportunity to present and contest facts, and courts to have the flexibility to permit them to do so under proper safeguards. Padilla's need to consult with a lawyer to help him do what the statute permits him to

do is obvious. He is held incommunicado at a military facility. His lawyer has been told that there is no guarantee even that her correspondence to him would get through. (Newman Aff. of 9/24/02 ¶ 8) Although it is not uncommon for habeas corpus cases to be pursued by petitioners *pro se*, such cases, usually involving challenges to either state convictions under 28 U.S.C. § 2254 or federal convictions under 28 U.S.C. § 2255, almost always are filed after the petitioners already have had the benefit of completed criminal proceedings, and appeals, in which they were represented by counsel. Padilla has had no such benefit here. It would frustrate the purpose of the procedure Congress established in habeas corpus cases, and of the remedy itself, to leave Padilla with no practical means whatever for following that procedure.

The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2000). In *United States* v. *Hayman*, 342 U.S. 205, 72 S. Ct. 263, 96 L.Ed. 232 (1952), the Supreme Court disapproved of a district court's use of *ex parte* procedures in a habeas corpus case under 28 U.S.C. § 2255 attacking a federal conviction. The Court pointed out that the district court could have used its powers under § 1651(a) in aid of its § 2255 jurisdiction, and ordered the petitioner transported from the district where he was confined so that a hearing could be held:

> The District Court is not impotent to accomplish this purpose, at least so long as it may invoke the statutory authority of federal courts to issue "all writs necessary or appropriate in aid of their

> respective jurisdictions and agreeable to the usages and principles of law." An order to secure respondent's presence in the sentencing court to testify or otherwise prosecute his motion is "necessary or appropriate" to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law.

Hayman, 342 U.S. at 221, 72 S. Ct. 263 (quoting 28 U.S.C. § 1651(a)).

In *Harris* v. *Nelson*, 394 U.S. 286, 89 S. Ct. 1082, 22 L.Ed.2d 281 (1969), the Supreme Court held that a district court could use its § 1651(a) powers to compel a warden to answer interrogatories posed by a habeas corpus petitioner:

> At any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly "dispose of the matter as law and justice require," either on its own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be "necessary or appropriate in aid of [its jurisdiction] . . . and agreeable to the usages and principles of law."

Id. at 300, 89 S. Ct. 1082 (quoting 28 U.S.C. §§ 2243 and 1651(a)). In the same case, the Court appears to have read broadly the power of a court hearing a habeas corpus petition to fashion remedies under the All Writs Act:

> [T]he habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651.

Id. at 299, 89 S. Ct. 1082.

The Court has also read generously the requirement that writs be issued only in aid of a court's jurisdiction. In *United States* v. *New York Telephone Co.*, 434 U.S. 159, 98 S. Ct. 364, 54 L.Ed.2d 376 (1977), the Court wrote of that requirement as follows: "[A] distinction between orders in aid of a court's own duties and jurisdiction and orders designed to better enable a party to effectuate his rights and duties . . . is specious." *Id.* at 175 n. 23, 98 S. Ct. 364.

I recognize that use of the All Writs Act itself is circumscribed by the requirement that the order be "necessary" in aid of a court's jurisdiction, and that that Act may not be employed to avoid the requirements of an otherwise applicable statute. "Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pa. Bureau of Corr.* v. *United States Marshals Serv.*, 474 U.S. 34, 43, 106 S. Ct. 355, 88 L.Ed.2d 189 (1985). However, the habeas corpus statutes do not address "the particular issue at hand."

The decision whether to grant or withhold an order under the All Writs Act lies "in the sound discretion of the court." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25, 63 S. Ct. 938, 87 L.Ed. 1185 (1943). Although, as

noted above, the right-to-counsel jurisprudence developed in cases applying the Sixth Amendment does not control this case, there would seem to be no reason why that jurisprudence cannot at least inform the exercise of discretion here. In Sixth Amendment cases, the Supreme Court has stressed repeatedly the importance of counsel to a defendant. *See, e.g., United States* v. *Gouveia*, 467 U.S. 180, 190, 104 S. Ct. 2292, 81 L.Ed.2d 146 (1984) ("[T]he right to counsel exists to protect the accused during trial-type confrontations with the prosecutor."); *Kirby* v. *Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 32 L.Ed.2d 411 (1972) ("[A] defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."). Although the Sixth Amendment does not control Padilla's case, the logic of the underlying case law suggests that discretion under the All Writs Act should be exercised in favor of permitting him to consult with counsel in aid of his petition and, in particular, in aid of responding to the Mobbs Declaration should he choose to do so.

The government has argued that affording access to counsel would "jeopardize the two core purposes of detaining enemy combatants—gathering intelligence about the enemy, and preventing the detainee from aiding in any further attacks against America." (Respondents' Resp. to This Ct's 10/21/02 Order at 6) This would happen, the government argues, because access to counsel would interfere with questioning, and because al Qaeda operatives are trained to use third parties as intermediaries to pass messages to fellow terrorists, even if "[t]he intermediaries may be unaware that they are being so used." (*Id.* at 7)

However, access to counsel need be granted only for purposes of presenting facts to the court in connection with this petition if Padilla wishes to do so; no general right to counsel in connection with questioning has been hypothesized here, and thus the interference with interrogation would be minimal or nonexistent. As to the possibility that Padilla might use his lawyers to pass messages to others, there are several responses to that conjecture. First, accepting that conjecture at face value and across the board proves far too much: by the government's logic, no indicted member of al Qaeda facing trial in an Article III court should be allowed to consult with counsel—a result barred by the Sixth Amendment. Second, I have read both the Mobbs Declaration and the Sealed Mobbs Declaration, the latter only for the purpose of assessing the government's access-to-counsel argument; the government's conjecture is, on the facts presented to me in those documents, gossamer speculation. Although the government presents facts showing that Padilla had contact with and was acting on behalf of al Qaeda, there is nothing to indicate that Padilla in particular was trained to transmit information in the way the government suggests, or that he had information to transmit. Third, Padilla has already had meetings with counsel in New York, and thus whatever speculative damage the government seeks to prevent may already have been done. Fourth, there is no reason that military personnel cannot monitor Padilla's contacts with counsel, so long as those who participate in the monitoring are insulated from any activity in connection with this petition, or in connection with a future criminal prosecution of Padilla, if there should ever be one. The U.S. Bureau of Prisons has adopted such procedures with respect to incarcerated defendants who present a

similar danger. *See* Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(a) (2002) (special procedures to be used if "there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily harm to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons"). One would think that such procedures would go a long way toward preventing Padilla from transmitting information through his lawyers to others. Finally, Padilla's lawyers themselves are members of this court's Criminal Justice Act panel who have appeared before this court in numerous cases. In addition to being able advocates, they have conducted themselves at all times in a fashion consistent with their status as—to use the antique phrase—officers of the court. There is nothing in their past conduct to suggest that they would be inclined to act as conduits for their client, even if he wanted them to do so.

Even giving substantial weight, as I do, to the President's statement in the June 9 Order that Padilla is "a continuing, present and grave danger to the national security of the United States" and that his detention "is necessary to prevent him from siding with al Qaeda in its efforts to attack the United States," there has been no fact presented to me that shows that the source of that danger is the possibility that Padilla will transmit information to others through his lawyers. By contrast, Padilla's statutorily granted right to present facts to the court in connection with this petition will be destroyed utterly if he is not allowed to consult with counsel. On the facts presented in this case, the balance weighs heavily in Padilla's favor.

I do not believe that the decision in *Hamdi* v. *Rumsfeld*, 296 F.3d 278 (4th Cir. 2002), alters the balance in the government's favor. In that case, the Court of Appeals for the Fourth Circuit reversed the order of a district court directing the government to permit unmonitored access by counsel to a detainee captured in Afghanistan and held at a Navy brig in Norfolk, Virginia. The order was rendered without benefit of briefing or argument, and with "little indication in the order (or elsewhere in the record for that matter) that the court gave proper weight to national security concerns." *Id.* at 282. According to the Fourth Circuit, "[t]he peremptory nature of the [District Court's] proceedings st[ood] in contrast to the significance of the issues before the court." *Id.* No such access is to be granted here, and the court has had the full benefit of the government's submissions, both sealed and unsealed. Further, Padilla's situation appears to differ from Hamdi's in that he had access to counsel after his capture but before his designation as an enemy combatant, and thus no potential prophylactic effect of an order barring access by counsel could have been lost.

Because this court has jurisdiction over Padilla's petition, and because the procedure outlined by the applicable statutes cannot be followed unless Padilla is permitted to consult with counsel, respondent Secretary Rumsfeld will be directed to permit Padilla to consult with counsel solely for the purpose of submitting to the court facts bearing upon his petition, under such conditions as the parties may agree to, or, absent agreement, such conditions as the court may direct so as to foreclose, so far as possible, the danger

that Padilla will use his attorneys for the purpose of conveying information to others.

VI. THE STANDARD APPLICABLE TO THIS COURT'S REVIEW AND THE FACTS THE COURT MAY CONSIDER

Before Padilla consults with counsel for the purpose of submitting facts to the court in aid of his petition, it would seem essential for him to know what standard the court will apply in determining whether whatever facts the government has presented are sufficient to warrant the finding in the President's June 9 Order that Padilla is an unlawful combatant. In addition, it would be helpful for Padilla to know, at least in a general sense, what the court will consider in that calculus other than what appears in the Mobbs Declaration—in particular, whether the court will consider the Sealed Mobbs Declaration. Unless he has some idea as to both of these subjects, he cannot decide what sort of factual presentation he must make, or indeed whether he wishes to stand mute rather than try to present any facts at all. The standard the court will apply in deciding the sufficiency of the government's showing is described below. In addition, I do not believe it necessary to decide now whether to consider the Sealed Mobbs Declaration. For the reasons explained below, Padilla can determine whether to submit facts, and frame those facts, solely based on the Mobbs Declaration and without knowing precisely the content of the sealed submission.

A. *Deference Due the President's Determination*

Padilla does not seem to dispute that courts owe considerable deference, as a general matter, to the acts and orders of the political branches—the President and Congress—in matters relating to foreign policy, national security, or military affairs. Nor could he. The Court of Appeals for the Fourth Circuit wrote as follows on that subject when it considered, and reversed, the order discussed immediately above, peremptorily granting to a detained combatant, captured during military operations in Afghanistan, unmonitored access to counsel:

> The order [under review] arises in the context of foreign relations and national security, where a court's deference to the political branches of our national government is considerable. It is the President who wields "delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." And where as here the President does act with statutory authorization from Congress, there is all the more reason for deference. Indeed, Articles I and II prominently assign to Congress and the President the shared responsibility for military affairs. *See* U.S. Const. art. I, § 8; art. II, § 2. In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs. This deference extends to military designations of individuals as enemy

> combatants in times of active hostilities, as well as to their detention after capture on the field of battle. The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2. As far back as the Civil War, the Supreme Court deferred to the President's determination that those in rebellion had the status of belligerents. And in World War II, the Court stated in no uncertain terms that the President's wartime detention decisions are to be accorded great deference from the courts.

Hamdi, 296 F.3d at 282 (citations omitted). Instead of disputing general principles, Padilla seeks to take his case outside their reach. Thus, he argues variously (i) that the President lacks statutory authority to act because Congress refrained in the Joint Resolution from declaring war, the Joint Resolution is limited only to those directly involved in the September 11 attacks, and the Patriot Act rather than the Joint Declaration should be read to control his case (Petitioners' Br. in Supp. of Am. Pet. and in Resp. to Respondents' Mot. to Dismiss at 9-12, 17-18); and (ii) the President lacks constitutional authority because his constitutional powers as Commander in Chief and as sole authority in the conduct of foreign affairs do not reach the capture of a United States citizen on American soil, and his detention as an enemy combatant (*id.* at 13-15, 16-17).

Padilla insists that this court conduct a "searching inquiry" into the factual basis for the President's determination that Padilla is an enemy combatant, lest the court "rubber stamp" the June 9 Order and thereby enforce a "Presidential whim." (*Id.* at 22, 32) In essence, Padilla argues that he is entitled to a trial on

the issue of whether he is an unlawful combatant or not.[15]

However, as set forth above, Padilla has lost the legal arguments he relies on to remove this case from the reach of the principles described by the Fourth Circuit in *Hamdi*, cited above. The President, for the reasons set forth above, has both constitutional and statutory authority to exercise the powers of Commander in Chief, including the power to detain unlawful combatants, and it matters not that Padilla is a United States citizen captured on United States soil. *See supra* pp. [119a-123a]. In his frequently-cited concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L.Ed. 1153 (1952), Justice Jackson described three degrees of Presidential authority. First, when the President acts pursuant to express or implied authorization by Congress, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635, 72 S. Ct. 863. Second, when he acts absent either approval or disapproval from Congress, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637, 72 S. Ct. 863. Third, when a President acts in a way incompatible with Congress's express or implied will, "his power is at its lowest ebb,

[15] In an affidavit submitted "on information and belief" (Newman Aff. of 9/24/02 ¶ 1), Newman states what appears to be her belief, although not the information that led to it, that Padilla had "traveled to Chicago to visit with his son," and then "planned to travel to Florida to visit other members of his family." (*Id.* ¶¶ 2, 3) That affidavit does not deny the allegations in the Mobbs Declaration relating to Padilla's activities in Afghanistan and Pakistan.

for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* In the decision to detain Padilla as an unlawful combatant, for the reasons set forth above, the President is operating at maximum authority, under both the Constitution and the Joint Resolution.

Notwithstanding *Hamdi*, and the cases it cites—which are, for the most part, the cases cited in support of the above findings as to the President's authority—it would be a mistake to create the impression that there is a lush and vibrant jurisprudence governing these matters. There isn't. *Quirin* offers no guidance regarding the standard to be applied in making the threshold determination that a habeas corpus petitioner is an unlawful combatant. Because the facts in *Quirin* were stipulated, *see Quirin*, 317 U.S. at 19, 63 S. Ct. 1, the *Quirin* Court moved directly to the legal principles applicable to unlawful combatants, and then to the application of those principles to the undisputed facts. Other controlling cases date to World War II, the Civil War, and even further back. As Justice Jackson observed in *Sawyer*, "[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves." *Sawyer*, 343 U.S. at 634, 72 S. Ct. 863. In this case, that poverty reflects, in part, a blessing—the blessedly placid history this country has enjoyed. The last time this country experienced widespread mayhem was during the Civil War; the last time a foreign army marched here was during the War of 1812.

However, if the case law seems sparse and some of the cases abstruse, that is not because courts have not

recognized and do not continue to recognize the President's authority to act when it comes to defending this country. Recall that in *Zadvydas* v. *Davis*, cited above, even as the Supreme Court placed limits on the government's authority to detain immigrants awaiting deportation, *Zadvydas*, 533 U.S. at 691-97, 701, 121 S. Ct. 2491, the Court was careful to point out that the case before it did not involve "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security," *id.* at 696, 121 S. Ct. 2491. The "political branches," when they make judgments on the exercise of war powers under Articles I and II, as both branches have here, need not submit those judgments to review by Article III courts. Rather, they are subject to the perhaps less didactic but nonetheless searching audit of the democratic process.

Zadvydas was decided at the end of June 2001, less than three months before the September 11 attacks, and the language now seems to convey ominous prescience. To the extent that the Court took pains to limit the rule it was creating so as to exclude cases involving "terrorism or other special circumstances" warranting "heightened deference to the judgments of the political branches," the quoted language cannot be dismissed as dictum. If it is dictum, it is the sort of considered dictum to which lower courts such as this one must pay particular heed. *See* Judge Newman's opinion in *United States* v. *Oshatz*, 912 F.2d 534, 540 (2d Cir. 1990) (distinguishing considered dictum from peripheral observations).

The deference to which the Supreme Court and the Fourth Circuit refer is due not because judges are not personally able to decide whether facts have been established by competent evidence, or whether those facts are sufficient to warrant a particular conclusion by a preponderance of evidence, or by clear and convincing evidence, or beyond a reasonable doubt. Indeed, if there is any task suited to what should be the job skills of judges, deciding such issues is it. Rather, deference is due because of a principle captured in another "statement of Justice Jackson—that we decide difficult cases presented to us by virtue of our commissions, not our competence." *Dames & Moore* v. *Regan*, 453 U.S. 654, 661, 101 S. Ct. 2972, 69 L.Ed.2d 918 (1981). That principle applies equally to the case a judge feels unqualified for but must decide, as to the case a judge feels well qualified for but may not decide. The commission of a judge, as *The Prize Cases*, the other authority cited at pages [119a-135a] above, and the quoted language from *Zadvydas* suggest, does not run to deciding *de novo* whether Padilla is associated with al Qaeda and whether he should therefore be detained as an unlawful combatant. It runs only to deciding two things: (i) whether the controlling political authority—in this case, the President—was in fact exercising a power vouchsafed to him by the Constitution and the laws; that determination in turn, is to be made only by examining whether there is some evidence to support his conclusion that Padilla was, like the German saboteurs in *Quirin*, engaged in a mission against the United States on behalf of an enemy with whom the United States is at war, and (ii) whether that evidence has not been entirely mooted by subsequent events. The first determination—that there is some evidence of Padilla's hostile status—would support the President's

assertion in the June 9 Order that he was exercising the power referred to above. That is the "some evidence" test suggested in the government's papers (Respondents' Resp. to and Mot. to Dismiss Am. Pet. at 17), and it will be applied once Padilla presents any facts he may wish to present to the court.

B. *The Sealed Mobbs Declaration*

There remains the question of whether the court will consider the Sealed Mobbs Declaration not only to help decide whether Padilla presents a particular danger if he is allowed to consult with counsel, as has already been done, but also to help decide whether there was some evidence to support the President's decision to designate him an enemy combatant, and whether such evidence has not become moot. Padilla objects to my doing so, arguing that he has a fundamental right to avoid suffering serious injury based on facts that are not disclosed. Thus, he cites *Greene* v. *McElroy*, 360 U.S. 474, 79 S. Ct. 1400, 3 L.Ed.2d 1377 (1959), where the Supreme Court reversed denial of a security clearance to the employee of a defense contractor based on confidential reports, with Chief Justice Warren writing for the Court as follows:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Id. at 496, 79 S. Ct. 1400. Although the government has not discussed *Greene* in its reply papers, the case is

distinguishable from this one on several bases, including that the confidential evidence was used before an executive agency and without explicit delegation from Congress or the President. *Id.* at 507, 79 S. Ct. 1400.

Closer to the case at hand is *United States* v. *Hayman*, discussed at pages [148a-149a] above, where a district court faced with a claim of ineffective assistance of counsel in a habeas corpus case held a hearing without having the petitioner present, and then found that counsel had engaged in the conflicted representation with the knowledge and consent of the petitioner. The Supreme Court disapproved and reversed, holding that the district court "did not proceed in conformity with Section 2255 when it made findings on controverted issues of fact relating to respondent's own knowledge without notice to respondent and without his being present." *Hayman*, 342 U.S. at 220, 72 S. Ct. 263; *see also*, *Walker* v. *Johnston*, 312 U.S. 275, 285, 61 S. Ct. 574, 85 L.Ed. 830 (1941) (holding that disputed issues of fact cannot be resolved based on affidavits and must be decided based on evidentiary hearings, "the only admissible procedure" for resolving such issues). Although, as the government argues, in military habeas corpus cases "the inquiry, the scope of matters open for review, has always been more narrow than in civil cases," *Burns* v. *Wilson*, 346 U.S. 137, 139, 73 S. Ct. 1045, 97 L.Ed. 1508 (1953) (plurality opinion), the Court in *Burns* went to some lengths to discuss the care with which military appellate courts had reviewed the petitioners' claims, *id.* at 144-45, 73 S. Ct. 1045.

Judge Sand's opinion in *United States* v. *Bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000), suggests that,

rather than dealing with the problem at the level of abstract principle, it may be more useful to examine precisely what the nature is of the confidential submission so as to determine what rights, if any, are compromised if the court considers it. In *Bin Laden*, Judge Sand resolved a motion to suppress electronic surveillance without holding a hearing, based in part on "*in camera, ex parte* review of . . . sensitive material in the case." *Id.* at 287. He found, as required, that such review was necessary due to the damage that could be caused by disclosure of the subject information, *id.*, and also that the issues before him were not factually complex and were predominantly legal, so that the "benefit [to the court] of holding an adversary hearing was substantially lessened," *id.* He noted that the question before him was whether the searches in question were conducted for foreign intelligence purposes or law enforcement purposes, and that resolving that question "required that the Court review a limited (and manageable) number of documents." *Id.* Judge Sand upheld withholding disclosure of the classified material before him even to defense attorneys who had clearance to review certain classified documents, noting that clearance to see certain classified documents does not necessarily mean clearance to see all such documents. *Id.* at 287 n.27.

Of course, I recognize that Padilla is not pressing his objection simply to give the court the benefit of the adversary process, and that he raises an issue of fairness. However, the Sealed Mobbs Declaration does not engage issues of fairness to the extent that might at first be supposed because it does not broaden the nature of the accusations against Padilla beyond the bounds of the Mobbs Declaration itself, nor does it refer

to conduct by Padilla that is not described in the Mobbs Declaration. Instead, other than identifying one or more of the sources referred to only in cryptic terms in the Mobbs Declaration, the sealed document simply sets forth objective circumstantial evidence that corroborates the factual allegations in the Mobbs Declaration. Padilla's access to the unclassified Mobbs Declaration gives him all the notice necessary to meet the allegations of whom he had contact with and what he did, or to explain why those allegations are now moot. Padilla is not in a position to dispute the government's claim that disclosure of the Sealed Mobbs Declaration "could compromise intelligence gathering crucial to the ongoing war effort by revealing sources and by divulging methods of collecting intelligence." (Respondents' Resp. to This Ct's 10/21/02 Order at 15)

Whatever outcome might result from the discussion above, I need not reach the issue of whether to consider the Sealed Mobbs Declaration now. If, after Padilla has had an opportunity to contest the unsealed Mobbs Declaration, I find that the government has failed to meet the some evidence standard, I will decide whether to consider the sealed document. At that point, I will have two options: (1) I could find that it is impermissible to use the sealed document without giving Padilla access to it, in which case the government will have the option of withdrawing the submission; or (2) I could consider the sealed document *in camera*. Before Padilla has disputed any facts, it would be premature to choose between these options.

* * * * * *

To recapitulate: (i) Newman may pursue this petition as next friend to Padilla, and the government's motion

to dismiss for lack of standing therefore is denied; (ii) Secretary Rumsfeld is the proper respondent in this case, and this court has jurisdiction over him, as well as jurisdiction to hear this case, and the government's motion to dismiss for lack of jurisdiction, or to transfer to South Carolina, is denied; (iii) the President is authorized under the Constitution and by law to direct the military to detain enemy combatants in the circumstances present here, such that Padilla's detention is not *per se* unlawful; (iv) Padilla may consult with counsel in aid of pursuing this petition, under conditions that will minimize the likelihood that he can use his lawyers as unwilling intermediaries for the transmission of information to others and may, if he chooses, submit facts and argument to the court in aid of his petition; (v) to resolve the issue of whether Padilla was lawfully detained on the facts present here, the court will examine only whether the President had some evidence to support his finding that Padilla was an enemy combatant, and whether that evidence has been mooted by events subsequent to his detention; the court will not at this time use the document submitted *in camera* to determine whether the government has met that standard.

The parties will discuss and arrange the conditions for defense counsel's consultation with Padilla, and will attend a conference on December 30, 2002, at 9:15 a.m., in Courtroom 21B of the United States Courthouse, 500 Pearl Street, New York, N.Y. 10007, to report on the results of those discussions and arrangements, and to schedule further proceedings in this case.

SO ORDERED.

APPENDIX C

Declaration of Michael H. Mobbs
Special Advisor to the Under Secretary of Defense for Policy

Pursuant to 28 U.S.C. § 1746, I, Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:

1. I am a government employee (GS-15) of the U.S. Department of Defense and serve as a special Advisor to the Under Secretary of Defense for Policy. The Under Secretary of Defense for policy is appointed by the President and confirmed by the Senate. He is the principal staff assistant and advisor to the Secretary and Deputy Secretary of Defense for all matters concerning the formulation of national security and defense policy and the integration and oversight of DoD policy and plans to achieve national security objectives. The Under Secretary of Defense for Policy has directed me to head his Detainee Policy Group. Since mid-February 2002, I have been substantially involved with matters related to the detention of enemy combatants in the current war against the Al Qaeda terrorists and those who support and harbor them (including the Taliban).

2. As part of my official duties, I have reviewed government records and reports about Jose Padilla (also known as "Abdullah al Muhajir" and "Ibrahim Padilla") relevant to the President's June 9, 2002 determination that Padilla is an enemy combatant and the President's order that

Padilla be detained by U.S. military forces as an enemy combatant.

3. The following information about Padilla's activities with the Al Qaeda terrorist network was provided to the President in connection with his June 9, 2002 determination. This information is derived from multiple intelligence sources, including reports of interviews with several confidential sources, two of whom were detained at locations outside of the United States.[1] The confidential sources have direct connections with the Al Qaeda terrorist network and claim to have knowledge of the events described. Certain aspects of these reports were also corroborated by other intelligence information when available.

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[1] Based on the information developed by U.S. intelligence and law enforcement agencies, it is believed that the two detained confidential sources have been involved with the Al Qaeda terrorist network. One of the sources has been involved with Al Qaeda for several years and is believed to have been involved in the terrorist activities of Al Qaeda. The other source is also believed to have been involved in planning and preparing for terrorist activities of Al Qaeda. It is believed that these confidential sources have not been completely candid about their association with Al Qaeda and their terrorist activities. Much of the information from these sources has, however, been corroborated and proven accurate and reliable. Some information provided by the sources remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials. One of the sources, for example, in a subsequent interview with a U.S. law enforcement official recanted some of the information that he had provided, but most of this information has been independently corroborated by other sources. In addition, at the time of being interviewed by U.S. officials, one of the sources was being treated with various types of drugs to treat medical conditions.

4. Padilla was born in New York. He was convicted of murder in Chicago in approximately 1983 and incarcerated until his eighteenth birthday. In Florida in 1991, he was convicted of a handgun charge and sent to prison. After his release from prison, Padilla began referring to himself as Ibrahim Padilla.[2] In 1998, he moved to Egypt and was subsequently known as Abdullah Al Muhajir. In 1999 or 2000 Padilla traveled to Pakistan. He also traveled to Saudi Arabia and Afghanistan.

5. During his time in the Middle East and Southwest Asia, Padilla has been closely associated with known members and leaders of the Al Qaeda terrorist network.

6. While in Afghanistan in 2001, Padilla met with senior Usama Bin Laden lieutenant Abu Zubaydah. Padilla and an associate approached Zubaydah with their proposal to conduct terrorist operations within the United States. Zubaydah directed Padilla and his associate to travel to Pakistan for training from Al Qaeda operatives in wiring explosives.

7. Padilla and his associate conducted research in the construction of a "uranium-enhanced" explosive device. In particular, they engaged in research on this topic at one of the Al Qaeda safehouses in Lahore, Pakistan.

8. Padilla's discussions with Zubaydah specifically included the plan of Padilla and his associate to build and detonate a "radiological dispersal de-

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[2] Padilla's use of the name "Ibrahim Padilla" was not included in the information provided to the President on June 9, 2002.

vice" (also known as a "dirty bomb") within the United States, possibly in Washington, DC. The plan included stealing radioactive material for the bomb within the United States. The "dirty bomb" plan of Padilla and his associate allegedly was still in the initial planning stages, and there was no specific time set for the operation to occur.

9. In 2002, at Zubaydah's direction, Padilla traveled to Karachi, Pakistan to meet with senior Al Qaeda operatives to discuss Padilla's involvement and participation in terrorist operations targeting the United States. These discussions included the noted "dirty bomb" plan and other operations including the detonation of explosives in hotel rooms and gas stations.[3] The Al Qaeda officials held several meetings with Padilla. It is believed that Al Qaeda members directed Padilla to return to the United States to conduct reconnaissance and/or other attacks on behalf of Al Qaeda.

10. Although one confidential source stated that he did not believe that Padilla was a "member" of Al Qaeda, Padilla has had significant and extended contacts with senior Al Qaeda members and operatives. As noted, he acted under the direction of Zubaydah and other senior Al Qaeda operatives, received training from Al Qaeda operatives in furtherance of terrorist activities, and was sent to the United States to conduct reconnaissance and/or other attacks on their behalf.

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[3] These attacks were to involve multiple, simultaneous attacks on such targets, and also included train stations. The additional facts in this footnote were not included in the information provided to the President on June 9, 2002.

11. Padilla traveled from Pakistan to Chicago via Switzerland and was apprehended by federal officials on May 8, 2002, upon arrival in the United States. Pursuant to court order, Padilla was held by the U.S. Marshals Service as a material witness in a grand jury investigation.

12. On June 9, 2002, George W. Bush, as President of the United States and Commander in Chief of the U.S. armed forces, determined that Jose Padilla is, and was at time he entered the United States in May 2002, an enemy combatant in the ongoing war against international terrorism, including the Al Qaeda international terrorist organization. A redacted version of the President's determination is attached at Tab 1.

13. The President specifically determined that Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation of acts of international terrorism that had the aim to cause injury to or adverse effects on the United States.

14. The President further determined that Padilla posed a continued, present and grave danger to the national security of the United States, and that detention of Padilla as an enemy combatant was necessary to prevent him from aiding Al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens.

15. On June 9, 2002, the President directed the Secretary of Defense to detain Padilla as an enemy combatant.

16. On June 9, 2002, acting on the President's direction, the Secretary of Defense ordered the U.S.

armed forces to take control of Padilla as an enemy combatant and to hold him at the Naval Consolidated Brig, Charleston, South Carolina.

/s/ MICHAEL H. MOBBS
MICHAEL H. MOBBS
Special Advisor to the
Under Secretary of Defense for Policy

Dates: 27 August 2002

(37)

IN THE SUPREME COURT OF THE UNITED STATES

No. 03-1027

Supreme Court, U.S.
FILED
JAN 16 2004
OFFICE OF THE CLERK

DONALD RUMSFELD, PETITIONER

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION TO EXPEDITE CONSIDERATION OF PETITION FOR CERTIORARI
AND TO ESTABLISH EXPEDITED SCHEDULE FOR BRIEFING
AND ARGUMENT IF CERTIORARI IS GRANTED

In a petition for certiorari filed today, the Solicitor General, on behalf of petitioner Donald Rumsfeld, Secretary of Defense, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The court of appeals' unprecedented decision orders the release of an individual whom the President -- acting as Commander in Chief in a time of war -- has determined should be detained as an enemy combatant. Because of the importance and urgency of the questions presented for review in this case, and because the Court recently granted a petition for certiorari to review the decision of the Fourth Circuit in Hamdi v. Rumsfeld, cert. granted, No. 03-6696 (Jan. 9, 2004), which raises related

issues concerning the authority of the President during wartime to order the detention of American citizens as enemy combatants, petitioner moves for adoption of a schedule and for other procedural actions that will permit the Court to expedite consideration of the petition and briefing and argument on the merits such that oral argument in this case could be heard in the upcoming April session of this Court, when oral argument in the Hamdi case will also be heard.

1. On December 18, 2003, the Second Circuit held that the President of the United States lacks authority to detain as an enemy combatant Jose Padilla, a United States citizen seized within the United States on May 8, 2002. The President ordered Padilla's detention as an enemy combatant based on a determination that Padilla is closely associated with al Qaeda and came to the United States to advance plans for the conduct of further terrorist attacks against the United States. See Pet. App. 57a-58a. The Second Circuit ruled that Padilla's detention is barred by 18 U.S.C. 4001(a). The court reasoned that Section 4001(a) prohibits the detention of American citizens detained by the military as enemy combatants, and that Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), fails to authorize Padilla's detention, because it does not "include[] the authority to detain American citizens seized on American soil and not actively engaged in combat." Pet. App. 51a.

Expedited consideration is warranted because the Second Circuit's decision undermines the constitutional authority of the Commander in Chief to protect the United States against additional enemy attacks launched within the Nation's borders. Those concerns are particularly acute in the current conflict, waged against an enemy that operates in secret and plots surreptitious and large-scale attacks on civilian targets. Expedited consideration is also warranted to permit this Court to consider this case at the same time it considers the related questions of the President's authority to detain American citizens as enemy combatants during wartime presented in the Hamdi case.

2. Counsel for respondents have agreed to expedited consideration of the petition. Under the schedule worked out between the parties, respondents' brief in opposition to certiorari would be filed on February 4, 2004, and petitioner would waive the 10-day period provided for in this Court's Rule 15 between the filing of the brief in opposition and distribution of the petition. That would allow the petition for certiorari and related briefs to be distributed in advance of this Court's scheduled conference on February 20, 2004.

If the Court grants the petition for certiorari, then the parties would propose the following schedule for the Court's consideration: (1) petitioner's opening merits brief to be filed on March 17, 2004; (2) respondents' merits brief to be filed on

April 12, 2004; (3) petitioner's reply brief to be filed on April 21, 2004; and (4) oral argument in this case, as well as oral argument in the Hamdi case, to be heard on April 28, 2004.

3. In light of the need for expedition and the shortness of time, petitioner also moves for leave to file the petition for certiorari in page proofs, with printed copies to follow.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
Counsel of Record

JANUARY 2004

(4)

No. 03-1027

IN THE

Supreme Court of the United States

DONALD RUMSFELD,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

1. Whether the President has the authority to imprison as an "enemy combatant" an American citizen seized on American soil outside a zone of combat.

2. Whether, if the President has such authority, (a) there are limitations on the circumstances in which such authority may be exercised and the length of time an individual may be imprisoned, and (b) the individual detained may challenge the President's assertion of that authority at a meaningful hearing with the assistance of counsel.

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No. 03-1027

IN THE
Supreme Court of the United States

DONALD RUMSFELD, PETITIONER

v.

JOSE PADILLA AND DONNA R. NEWMAN, AS NEXT FRIEND OF JOSE PADILLA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT

Respondent Jose Padilla and Donna R. Newman, as next friend of Jose Padilla, respectfully submit this opposition to the Petition for Certiorari.

STATEMENT

For almost two years, Jose Padilla, an American citizen seized on American soil outside a zone of combat, has been held incommunicado in a military prison. The sole basis for his detention is a presidential order declaring him to be an "enemy combatant" – a term not defined by any act of Congress, any federal regulation, or any treaty. Under the Government's theory, the President may declare any citizen within the United States to be an "enemy combatant," allowing the military to imprison the individual indefinitely (or until the "war on terror" is over) and to interrogate him without limit until the Secretary of Defense decides his "intelligence value" is gone. Under the Government's view, the Executive has virtually unbridled and unreviewable power to imprison

American citizens in the domestic arena – a proposition wholly at odds with our constitutional history and the rule of law on which our country is based.

The Petition should be denied. Jose Padilla has been imprisoned for almost two years. No criminal charges have been brought against him. He is not being held as a material witness. The Court of Appeals properly held that unless charges are brought or a material witness warrant is served, Padilla is legally entitled to be released. There is nothing in Article II of the Constitution, or in any federal statute, that gives the President the unilateral power to seize American citizens in the domestic arena based on the President's unreviewable declaration that they are "enemy combatants." The Court of Appeals properly held that any authority to imprison American citizens domestically must, at a minimum, emanate from Congress, and Congress has not authorized, or established any parameters for, such a scheme of detention.

If the Court were to grant the Petition and find that the President had such a power to detain, it also must determine the circumstances and limits under which the President's asserted power may be exercised, and whether and how an individual may challenge the President's claim he is an "enemy combatant." Astoundingly, the Government asserts it may hold Padilla indefinitely so long as it produces "some evidence" – which it has defined as "*any* evidence in the record that *could* support the conclusion" – that Padilla is an undefined "enemy combatant."[1] The Government also has argued that Padilla has no need for, or right to, counsel to challenge this unprecedentedly minimal showing, and it contends that even allowing Padilla to consult with counsel would upset the "sense

[1] Opening Br. of United States as Resp.-Appellant, *Padilla v. Rumsfeld*, No. 03-2235, at 48 (2d Cir. filed July 22, 2003) (emphasis added).

of dependency" the Government's "interrogators are attempting to create" with Padilla.[2] Any consideration by this Court of the President's authority to detain must include review of whether, and pursuant to what process, the Executive may continue to hold Padilla after 20 months of imprisonment and interrogation.

The Court also should decline to review the Government's second question, which concerns whether Secretary Rumsfeld is a "proper respondent" and subject to service of process in New York. These are not the questions of national importance for which the Solicitor General seeks to have this case heard on an expedited basis. The Government's argument would allow the Executive to hand-pick the place where challenges to its authority may be heard, and it ignores the last 40 years of this Court's habeas jurisprudence. Padilla's habeas petition was filed in New York because the *Government* chose to bring Padilla there on a material witness warrant; because counsel was appointed for and consulted with Padilla in New York; and because the *Government* (through Secretary Rumsfeld), two days before a hearing on counsel's motion challenging Padilla's detention, sent military personnel to New York to seize Padilla from the federal marshals holding him in a federal detention center in New York.

The procedural issues raised in the Petition do not concern the power of the courts to hear this case; the Government concedes that habeas jurisdiction exists. *Every* judge to consider these issues, including Judge Wesley (otherwise dissenting in part) and Chief District Judge Mukasey, has agreed that Secretary Rumsfeld is a proper respondent and subject to suit in New York. These rulings, narrowly crafted to the unique facts of this case, are squarely in line with prior

[2] *See* Jacoby Decl. at 8-9, *quoted in Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 50 (S.D.N.Y. 2003).

decisions of this Court. Accordingly, this case is not an appropriate vehicle for considering broader questions of procedure in habeas cases, particularly on the expedited schedule sought by the Solicitor General.

For these reasons, the Petition should be denied. Alternatively, if the Petition is granted, the Court should consider on an expedited basis the questions presented as restated by respondent.

1. Padilla was arrested by civilian federal law enforcement agents at Chicago O'Hare International Airport, pursuant to a grand jury material witness warrant issued in the Southern District of New York, as he stepped off a regular commercial flight on May 8, 2002. Pet. App. 77a. Padilla was not carrying any weapons or explosives. *Id.* 4a. The Government alleges Padilla had discussions with al Queda members regarding a potential plot to set off a "dirty bomb" at some undetermined future time and place. The Government transported Padilla to the federal detention facility within the Southern District of New York, where he was held without bail. *Id.* 77a. As the Court of Appeals found, once Padilla was in the custody of federal marshals, "[a]ny immediate threat he posed to national security had effectively been neutralized." *Id.* 4a.

On May 15, 2002, the District Court appointed Donna R. Newman to represent Padilla. Newman met with Padilla numerous times. *Id.* 5a. On May 22, Newman filed a motion challenging the material witness warrant. *Id.* By June 7, the motion had been briefed and a hearing was scheduled for June 11. *Id.* However, two days before the hearing, the President signed an order "To the Secretary of Defense" declaring Padilla to be an "enemy combatant" and asserting that it was "consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant." *Id.* 57a-58a. The Secretary then sent military personnel to New

York to seize Padilla, and he chose to have Padilla imprisoned and interrogated at a military base in South Carolina. At the scheduled June 11 conference, Newman filed a habeas petition on Padilla's behalf, as "next friend."[3]

On December 4, 2002, the District Court ruled that Newman could serve as next friend for Padilla and that, given the unique facts of the case, Secretary Rumsfeld was a proper respondent and subject to suit in the Southern District of New York. The District Court held that the President had the authority to detain Padilla without criminal trial, but that Padilla was entitled to present facts to rebut the Government's claim that he was an "enemy combatant." However, the court held that "to resolve the issue of whether Padilla was lawfully detained," the court would "examine only whether the President had some evidence to support his finding that Padilla was an enemy combatant, and whether that evidence has been mooted by events subsequent to his detention." *Id.* 166a. The District Court also ruled that Padilla "may consult with counsel in aid of pursuing this petition," in a manner respective of national security concerns. *Id.*; *see also id.* 152a-155a.

2. Seeking to avoid even that minimal challenge to the President's authority, the Government sought an interlocutory appeal. The appeal was certified (including questions presented by Padilla), and the Court of Appeals issued its decision on December 18, 2003. *Id.* 1a.

a. At the outset, the court unanimously affirmed the District Court on several preliminary issues, including those raised by the Government here concerning location of suit. *See id.* 61a n.32 (Wesley, J., concurring that Secretary Rumsfeld is an appropriate respondent and that the District Court had personal jurisdiction over the Secretary).

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[3] The petition was amended on June 19, 2002.

First, the court found that Newman had next friend standing, a finding the Government does not challenge here.

Second, the court affirmed the District Court's ruling that, on the unusual facts of this case, Secretary Rumsfeld was a proper respondent. The court relied heavily on decisions of this Court that have recognized that the proper respondent in a habeas case is not always the petitioner's immediate custodian. *Id.* 15a-20a. *See, e.g., Ex parte Endo*, 323 U.S. 283, 304-06 (1944); *Strait v. Laird*, 406 U.S. 341, 344 (1972) (habeas petition could proceed in California even though named and proper respondent, petitioner's commanding officer, located in Indiana); *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973) (habeas petition could proceed in Kentucky even though petitioner in custody in Alabama).

Third, the court found that it had jurisdiction over Secretary Rumsfeld because he was amenable to the court's process under the New York long-arm statute, and, under controlling precedent of this Court, "[s]o long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction.'" *Braden*, 410 U.S. at 495, *quoted at* Pet. App. 22a; *see also Ex parte Endo*, 323 U.S. at 307 (habeas corpus may issue "if a respondent who has custody of the prisoner is within reach of the court's process."). The court found that Secretary Rumsfeld could be reached under the New York long-arm statute because he had "purposeful contacts" with the district that were "substantially related to the claims asserted by Padilla." Pet. App. 26a.

b. On the merits, the Court of Appeals considered carefully and at length the unique issue presented in this case concerning the asserted power of the President to imprison as an "enemy combatant" an American citizen seized in the domestic arena, on American soil outside a zone of combat. Ultimately, the court ruled that any authority to detain citizens

in these circumstances must emanate from Congress, and cannot be exercised by the President alone. Thus, the court held only that "clear congressional authorization" is required for "detentions of American citizens on American soil," and that such authorization is lacking here. *Id.* 2a. At bottom, therefore, the court's decision does not concern the ability of the *Government* to combat terrorism; at least at the outset, the issue here is purely one of *executive* versus *legislative* power, with regard to an unquestionably novel and momentous attempt to imprison citizens in the domestic arena for indefinite and extended periods without any charges or trial. As the Court of Appeals summarized at the outset of its opinion:

> As this Court sits only a short distance from where the World Trade Center once stood, we are as keenly aware as anyone of the threat al Qaeda poses to our country and of the responsibilities the President and law enforcement officials bear for protecting the nation. But presidential authority does not exist in a vacuum, and this case involves not whether those responsibilities should be aggressively pursued, but whether the President is obligated, in the circumstances presented here, to share them with Congress.

Id. The court noted "if the President believes [his] authority to be insufficient, he can ask Congress – which has shown its responsiveness – to authorize additional powers." *Id.* 55a.

i. The court began its analysis by carefully limiting its decision to "an American citizen arrested in the United States, not on a foreign battlefield or while actively engaged in armed conflict against the United States." *Id.* 27a. The court noted that Padilla carried no weapons or explosives at the time of his initial arrest, *id.* 4a, and already was locked up in a civilian maximum security detention center at the time of his seizure by

the military, *id.* 42a n.27. In light of these facts, the court emphasized that the case simply did not involve "issues concerning imminent danger" or the President's authority "to detain a terrorist in the face of imminent attack." *Id.*

Nor did the court question the Government's assertion that the United States is at war with al Qaeda. *Id.* 30a. Rather, the court analyzed the case *assuming* a state of war, using the separation of powers' framework announced in the wartime context of the steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *See* Pet. App. 28a (citing *Youngstown*, 343 U.S. at 585 (majority op.); *id.* at 635-38 (Jackson, J., concurring)). The Court of Appeals noted that "separation of powers concerns are heightened when the Commander-in-Chief's powers are exercised in the domestic sphere," because the Constitution dictates that "'Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.'" Pet. App. 32a (quoting *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring)).

The Court of Appeals acknowledged that the "Constitution envisions grave national emergencies and contemplates significant domestic abridgements of individual liberties during such times," but it found that "the Constitution lodges these powers with Congress, not the President." Pet. App. 35a. Specifically, the court emphasized that the Constitution vests Congress with the power to define and punish offenses against the law of nations, U.S. Const. art. I, § 8, cl. 10; with the power to suspend habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it," U.S. Const. art. I, § 9, cl. 2; and with the power to make laws providing for quartering of soldiers in private homes in time of war, U.S. Const. amend. III. *See* Pet. App. 34a-36a. In sum, the court emphasized that *Congress* is given the primary power to determine the impact of war in the domestic arena.

ii. Considering next the question whether Congress has authorized the President to seize citizens domestically as "enemy combatants," the court found that Congress in fact has expressly *forbidden* it. The court emphasized that Congress has provided that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). This statute, which the court referred to as the Non-Detention Act, repealed the earlier Emergency Detention Act of 1950, former 50 U.S.C. §§ 811-826, which had allowed detention of spies and saboteurs in case of invasion, war, or insurrection. Pet. App. 44a. The court found that a primary purpose of the Non-Detention Act was to prevent recurrence of situations like the Japanese internment camps of World War II, which had been established by the Executive in the context of a declared war. *Id.* 47a. Based on the language and legislative history of the Act, and this Court's prior interpretation of it, the court concluded that "the Act applies to all detentions and that precise and specific language authorizing the detention of American citizens is required to override its prohibition." *Id.*

The court's conclusion that § 4001(a) required a clear congressional authorization to detain was reinforced by this Court's decision in *Ex parte Endo*, which suggested that the Constitution itself requires that, when evaluating abridgements of civil liberties claimed to be necessary because of the exigencies of war, "[w]e must assume . . . that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Ex parte Endo*, 323 U.S. at 300, *quoted at* Pet. App. 52a.

The court found that neither of the acts of Congress on which the Government relied contained clear and unmistakable language authorizing the detention of American citizens on American soil outside a zone of combat. The court found that the "plain language" of the Joint Resolution Authorizing the

Use of Military Force against the perpetrators of September 11 attacks "contains nothing authorizing the detention of American citizens captured on United States soil, much less the express authorization required by 4001(a) and the 'clear,' 'unmistakable' language required by *Endo*." Pet. App. 52a. Similarly, the court rejected the argument that Padilla's detention was authorized by 10 U.S.C. § 956(5), which allows the expenditure of funds for the maintenance of prisoners of war and other military detainees. The court found that this statute was "devoid of language 'clearly' and 'unmistakably' authorizing the detention of American citizens" captured in the United States outside a zone of combat. Pet. App. 54a.

The court noted that its holding on authority "effectively moots arguments raised by both parties concerning access to counsel, standard of review, and burden of proof." *Id.* 4a n.1. Judge Wesley dissented in part; however, as explained further below, he viewed "the real weakness of the government's appeal" to be its contention that the President had the authority to detain Padilla indefinitely without affording him a "serious opportunity to put the government to its proof by an appropriate standard," assisted by counsel. *Id.* 74a, 75a.

REASONS TO DENY THE PETITION

The President's assertion in this case of a novel and unchecked power to imprison American citizens as "enemy combatants" is unarguably of great national significance. Nevertheless, this Court's review is not warranted at this time. The decision of the Court of Appeals was correct, and, due to the peculiar facts of this case and the narrowness of the court's decision, the case is not an appropriate vehicle for resolving broader questions related to the scope of the President's detention authority. Similarly, the Court of Appeals' fact-based ruling, narrowly tailored to this case, that Secretary Rumsfeld

is a proper respondent and subject to suit in New York does not present an important question for this Court.

A. Review By This Court Is Not Warranted Because The Court Of Appeals' Holding On The Scope Of The President's Authority Was Both Correct And Narrow.

1. The Court of Appeals Correctly Held that Both the Constitution and Section 4001(a) Require that the Military Detention of American Citizens on American Soil Must Be Supported by Clear and Unmistakable Congressional Authorization.

The Court of Appeals correctly held that both the Constitution and the Non-Detention Act, 18 U.S.C. § 4001(a), require a clear statement of congressional intent to authorize military detentions in the domestic arena. The court reviewed at length numerous constitutional provisions, as well as decisions of this Court, that make clear that the Framers gave *Congress* the power to determine the impact of war in the domestic arena. *See* Pet. App. 31a-36a, 51a-52a; *Ex parte Endo*, 323 U.S. at 298-300. Indeed, based on experience with the British monarchy, the Framers viewed the arbitrary detention of individuals by the Executive as a particular danger. This concern is expressed in several different constitutional provisions, including the Habeas Suspension Clause and the Due Process Clause of the Fifth Amendment.[4] The Habeas Suspension Clause clearly contemplates that "Rebellion or Invasion" might render military detention without criminal trial necessary for some time. *See* U.S. Const. art. I, § 9, cl. 2. By placing the Suspension Clause in Article I, however, the Framers vested *Congress*, not the President, with the power to authorize detentions without trial in those very limited

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[4] The procedural safeguards of the Fourth, Fifth and Sixth Amendments are also reflective of this concern.

circumstances. *See, e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807).[5]

The command of the Due Process Clause that no person "be deprived of life, liberty, or property, without due process of law" also requires that detentions be pursuant to positive, specific law. The Clause is an expression of the legal principle established with the Magna Carta that "the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful." 3 William Blackstone, Commentaries *133. In our system of government, the task of making laws – including laws defining the times, causes, and extent of permissible imprisonment – rests with the Legislature, not the President. *See Youngstown*, 343 U.S. at 587; *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).[6]

Contrary to the Government's claim, Pet. 17-18, the Non-Detention Act also was clearly intended to encompass detention of persons like Padilla. As the Court of Appeals found, the statute's plain language is unequivocal: "*No* citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (emphasis added); *see also Howe v. Smith*, 452 U.S. 473, 479

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[5] Because of the importance of habeas corpus in our constitutional scheme, long-standing tradition requires an exceptionally clear statement of congressional intent to repeal or limit habeas jurisdiction. *See, e.g. INS v. St. Cyr*, 533 U.S. 289, 299 (2001) ("Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction.").

[6] This Court has repeatedly rejected Executive Branch efforts to invade the liberty of American citizens without congressional authorization, even in the name of national security. *See United States v. United States Dist. Court*, 407 U.S. 297, 323-24 (1972); *New York Times Co. v. United States*, 403 U.S. 713, 719-20 (1971); *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936).

n.3 (1981) (characterizing § 4001(a) as "proscribing detention *of any kind* by the United States") (emphasis in original). The Non-Detention Act repealed a statute that specifically concerned detention of spies and saboteurs in time of war, invasion or "insurrection within the United States in aid of a foreign enemy." 50 U.S.C. § 812(a) (1970); *see* Pet. App. 44a. Moreover, "the manifest congressional concern" about the wartime detention of Japanese Americans demonstrates "that section 4001(a) limits military as well as civilian detentions." Pet. App. 47a. The Court of Appeals was correct in concluding that Congress intended that only "precise and specific language authorizing detention" would satisfy § 4001(a). Interpreting a general declaration of war or authorization for the use of force to implicitly authorize domestic detentions would vitiate the statute's core purpose of requiring the sort of public deliberation and accountability *on the specific issue of detention during a war* that was so lacking with the Japanese internment camps.[7]

Also contrary to the Government's assertion, Pet. 17-18, the canon of constitutional avoidance does not compel a reading of the Non-Detention Act that permits domestic military detentions without congressional authorization. Not only is such a construction incompatible with the statute's plain language, the Government's avoidance argument assumes the answer to the constitutional question that it seeks to avoid, namely that the President's Commander-in-Chief powers preempt the field and leave no room for congressional action – a doubtful conclusion at best. *See Youngstown*, 343 U.S. at 644

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[7] The Non-Detention Act would not have achieved its purpose of preventing a recurrence of the Japanese internment camps if it could be satisfied by a mere declaration of war or authorization for use of military force, for there had been such a congressional declaration of war at the time of the Japanese internment camps themselves.

(Jackson, J., concurring) ("Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy."). In addition, the Government's proposed construction raises at least as many constitutional questions as it avoids, because the military detention scheme the Executive proposes would raise serious questions under the Habeas Suspension Clause and the Fourth, Fifth and Sixth Amendments – questions that were fully raised and briefed below. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866) (holding that Constitution categorically prohibits "'laws and usages of war'" from being "applied to citizens in states . . . where the courts are open and their process unobstructed"). Indeed, the doctrine of constitutional avoidance counsels in favor of a requirement of clear congressional authorization for detentions to avoid unnecessarily resolving such questions.

2. The Court of Appeals Correctly Found that Congress Has Not Clearly and Unmistakably Authorized Padilla's Detention.

Neither of the congressional enactments on which the Government relies mention "enemy combatants," let alone provide the sort of clear authorization for detention that the Constitution and § 4001(a) demand. Congress's September 18, 2001 Authorization for Use of Military Force (AUMF) provides the President with authority to use "necessary and appropriate force" by deploying American military forces.[8] Its language simply cannot be read to authorize silently that which

[8] The AUMF provides: "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40, § 2, 115 Stat. 224 (Sept. 18, 2001).

Congress explicitly rejected in § 4001(a): the indefinite detention without charge of an unarmed American citizen seized outside a zone of combat. As the Court of Appeals pointed out, although Congress took pains to specify that the AUMF was intended to satisfy the War Powers Act, it nowhere mentions an intent to satisfy § 4001(a). Pet. App. 53a. In short, neither the text nor legislative history[9] of the AUMF mentions any sort of power to detain – let alone the awesome and unprecedented power the Government seeks to exercise here.[10]

Nor does the spending authorization in 10 U.S.C. § 965(5) authorize any particular sort of detention. In *Ex parte Endo*, the Executive similarly argued that an appropriations statute funding the War Relocation Authority (WRA) had implicitly ratified the WRA's detention of Japanese Americans, and this Court rejected the argument in no uncertain terms. *See* 323 U.S. at 303 n.24 (citations omitted). Here the claim of authorization is even weaker. 10 U.S.C. § 956 does not mention "enemy combatants," let alone "plainly show a purpose to bestow the precise authority" on the Executive to detain without charge Americans seized on American soil.

[9] Shortly after the September 11 attacks, the same Congress that passed AUMF passed the Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). Unlike the AUMF, the Patriot Act expressly gives the Executive authority to detain without charge aliens suspected of terrorist ties for short periods of time before initiation of criminal or removal proceedings. 8 U.S.C. § 1226a(a).. The limitations in the Patriot Act prove that Congress had not, in the AUMF, already delegated to the Executive unfettered discretion to detain *anyone*, *indefinitely*, without charge.

[10] Nor has the President made an explicit determination or showing, backed by evidence, that Padilla even fits within the terms of the AUMF, namely that he "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."

3. Neither the Commander-in-Chief Clause, Historical Practice, Nor This Court's decision in *Ex parte Quirin* Provide Authority for Padilla's Detention.

The Commander-in-Chief Clause does not give the President authority to detain American citizens on American soil outside a zone of combat. As even the Framers' most enthusiastic advocate of a strong Executive observed, the Executive's powers as Commander-in-Chief "amount to nothing more than the supreme command and direction of the military and naval forces. . . ." The Federalist No. 69, at 418 (Alexander Hamilton) (Clinton Rossiter, ed. 1961). Even in wartime, the President must share his powers with Congress:

> [T]he Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants. . . . That military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history.

Youngstown, 343 U.S. at 643-44 (Jackson, J., concurring).

Without doubt, in every war our military forces have seized prisoners of war on the battlefield. But there is a profound difference between the historical practice of detention of prisoners of war on the field of battle, and the new power the President claims here to deem the entire nation a battlefield in which any person may be seized and held without trial for the indefinite future. The risk of error, and the potential for abuse, are much greater in this new context, for the Executive's novel argument would allow it to exile any citizen from the protection of our Constitution and laws simply through the artifice of labeling him – without any visible standards – as an "enemy combatant." The Government's citations of "cases upholding

broad powers in military commanders engaged in day-to-day fighting in a theater of war" are thus unavailing. *Youngstown*, 343 U.S. at 587.

In large measure, the Government's argument about the propriety of Padilla's detention rests on a single foundation: some dicta in *Ex parte Quirin*, 317 U.S. 1 (1942). But *Quirin* cannot support the weight that the Government asks it to bear. *Quirin* is distinguishable from the case at hand on several important grounds. "First, and most importantly, the *Quirin* Court's decision to uphold military jurisdiction rested on express congressional authorization of the use of military tribunals to try combatants who violated the laws of war." Pet. App. 37a. Here, by contrast, there is no express congressional authorization, and Padilla is being held without any sort of trial at all. "Second, the petitioners in *Quirin* admitted that they were soldiers" in the German Army, and so the "*Quirin* Court deemed it unecessary to consider the dispositive issue here – the boundaries of the Executive's military jurisdiction – because the *Quirin* petitioners 'upon the conceded facts, were plainly within those boundaries.'" Pet. App. 39a (quoting 317 U.S. at 46). Third, *Quirin* was decided prior to the enactment of § 4001(a). Finally, this Court in *Quirin* went out of its way to caution that it had "no occasion now to define with meticulous care the ultimate boundaries" of military jurisdiction nor to consider the President's powers in the absence of Congressional legislation. 317 U.S. at 29, 45-46. *Quirin* thus provides no support for Padilla's detention.

B. Review Is Not Warranted Because The Narrow Holding Below Does Not Compromise The President's Ability To Preserve National Security In Time Of War.

Not only was the Court of Appeals correct in holding that the President lacked the authority to detain Padilla as an "enemy combatant," the peculiar facts of this case and the

narrowness of the decision both counsel against review. As noted previously, this case simply does not involve the President's "authority to detain a terrorist in the face of imminent attack," Pet. App. 42a n.27; Padilla was unarmed and not engaged in imminent hostilities when initially arrested, and already incarcerated in a maximum security prison by the time he was seized by the military.

This case does not involve judicial interference with the President's decisions on the battlefield; short of declaring the entire world a combat zone in which the President's war powers trump normal legal rules, the government cannot contend that either Chicago O'Hare airport or the Metropolitan Correctional Center were zones of combat. Indeed, the case is not even a good vehicle for resolving the application of the AUMF, for the Government has not even alleged sufficient facts to bring Padilla within the text of the statute, insofar as it does not claim that Padilla "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or person."

Finally, the Court of Appeals did not require Padilla's immediate release. It allowed Padilla to be transferred to civilian authorities for criminal trial or grand jury proceedings. Moreover, the court advised that if the President viewed these alternatives as inadequate, he could seek additional authority from Congress. This case does not involve a situation where the President must act immediately to respond to an emergency and lacks time to seek congressional authorization; Congress is open and operating, and if current laws are insufficient to deal with the threat of global terrorism, it is up to Congress – in the first instance – to enact new laws to deal with the threat.

C. Any Authority The President May Have Does Not Allow Him To Continue To Imprison Padilla.

The Court should deny the Petition for the reasons set forth above. Any consideration, however, of the President's authority to imprison American citizens domestically as "enemy combatants" must also include consideration of the circumstances and limits under which the President's asserted power may be exercised, and whether and how an individual may challenge the President's claim he is an "enemy combatant." *Every* judge who has considered this case has agreed that the President does *not* have the authority claimed by the Government – an authority to imprison an individual indefinitely, without ever affording him a meaningful opportunity, with the assistance of counsel, to challenge his detention.

The Government's assertion of Executive power in this case is raw and stark. After 20 months, the Government has not brought any charges against Padilla stemming from his alleged participation in a plot to commit a terrorist act. It appears the Executive seeks to imprison Padilla simply to incapacitate him as a possible threat or, more tellingly, to interrogate him further for potential intelligence. Apparently, after 20 months, Padilla still has not become sufficiently "dependent" on his captors to yield all the Government wants, or believes he has, and so his isolation and interrogation continue. It is difficult to imagine a closer parallel to one of the greatest fears of our founding patriots. As Madison wrote in Federalist No. 47, *supra* 16, at 301, "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny"; *see also Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218 (1953) (Jackson, J., dissenting) ("Executive imprisonment has been considered oppressive and

lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.").[11]

In order to test whether Padilla was, and remains, "lawfully detained on the facts present here," Pet. App. 166a, Chief Judge Mukasey ruled that Padilla has a right to challenge his detention with the assistance of counsel. *Id.* 142a-155a. The court stated that Padilla's need to consult with a lawyer was "obvious" given that "[h]e is held incommunicado at a military facility," and that Padilla's right to challenge the President's authority to detain him "will be destroyed utterly if he is not allowed to consult with counsel." *Id.* 147a-148a, 153a.

The Government challenged this ruling on appeal, contending that Padilla could be detained without any right to present evidence or have access to counsel to challenge the President's authority to detain him. Padilla also challenged rulings of the District Court, including the court's determination that the government need present only "some evidence" to imprison Padilla as an "enemy combatant," *Id.* 162a, 166a.

As set forth above, the Court of Appeals' ruling on the merits effectively rendered these issues moot. *Id.* 4a n.1. In dissent, however, Judge Wesley found that "the real weakness of the government's appeal" was its response to Padilla's asserted right to challenge his detention. *Id.* 74a. As described by Judge Wesley, "[t]he government contends that Mr. Padilla

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[11] Winston Churchill reiterated in 1943: "The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgment of his peers is in the highest degree odious, and is the foundation of all totalitarian government whether Nazi or Communist." *See* A.W.B. Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* 391 (1992).

can be held incommunicado for 18 months with no serious opportunity to put the government to its proof by an appropriate standard." *Id.* Judge Wesley squarely rejected that view, finding that Padilla was entitled to a hearing where, "assisted by counsel, [he] would be able to contest whether he is actually an enemy combatant. . . ." *Id.* 75a.

Judge Wesley raised central questions concerning the scope and conditions of the President's power to detain Padilla as an "enemy combatant":

> One of the more troubling aspects of Mr. Padilla's detention is that it is undefined by statute or Presidential Order. Certainly, a court could inquire whether Padilla continues to possess information that was helpful to the President in prosecuting the war against al Qaeda. Presumably, if he does not, the President would be required to charge Padilla criminally or delineate the appropriate process by which Padilla would remain under the President's control.

Id. (citations omitted). Judge Wesley concluded that, in our constitutional government, Padilla's claims are entitled to "careful and thoughtful attention and are examined not in the light of his cause – whatever it may be – but by the constitutional and statutory validity of the powers invoked against him." *Id.*

Should the Court grant review in this case, these questions concerning the manner in which the President's asserted power may be exercised must also be considered. Even the "plenary powers" of the Executive and Legislative Branches are "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *INS v. Chadha*, 462 U.S. 919, 941-42 (1983) (Congress must choose "a constitutionally permissible means of implementing" its power). In *Zadvydas*,

in order to avoid the serious constitutional question presented by an *indefinite* detention of removable aliens, this Court construed a statute authorizing detention "to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review." 533 U.S. at 682.

Similarly, if the President has any authority in the domestic arena to imprison citizens as "enemy combatants," it is necessary to determine the limits of that authority and how it may be exercised. As Judge Wesley noted, Padilla's detention "is undefined by statute or Presidential Order." Pet. App. 75a. No standards exist regarding how long, and for what reasons, Padilla may be imprisoned. These issues must be addressed before any judgment can be made regarding the correctness of the Court of Appeals' ultimate holding that, after 20 months of solitary confinement, Padilla either must be charged with a crime, detained as a material witness, or released. *Id.* 55a.

As both Judge Wesley and Chief Judge Mukasey recognized, Padilla's right to challenge by writ of habeas corpus the President's assertion of authority to detain him is "meaningless" and "will be destroyed utterly" without access to counsel. Pet. App. 75a, 153a. For over 20 months and continuing to this day, Padilla has been held by the President incommunicado. "[W]here the defendant . . . is incapable adequately of making his own defense . . . it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." *Powell v. Alabama*, 287 U.S. 45, 65 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

Similarly, the right to challenge whether Padilla was, and remains, "lawfully detained on the facts present here," Pet. App. 166a, requires that Padilla be afforded a "serious opportunity to put the government to its proof by an appropriate standard." *See id.* 74a (Wesley, J., concurring in part,

dissenting in part). Whether Padilla is today an "enemy combatant" is a "jurisdictional fact" critical to the President's asserted power to imprison him without trial. This Court has recognized that courts have both the authority and the obligation to make a threshold, *de novo* determination of jurisdictional facts critical to an exercise of authority. *See, e.g.*, *Frank v. Mangum*, 237 U.S. 309, 331 (1915); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *see also Burns v. Wilson*, 346 U.S. 137, 142-43 (1953) (plurality op.). And the Court repeatedly has held that an extended deprivation of liberty cannot be sustained on a showing of less than "clear and convincing evidence." *See United States v. Salerno*, 481 U.S. 739, 750 (1987); *Addington v. Texas*, 441 U.S. 418, 427 (1979).

If the Court grants review in this case, these issues concerning the exercise of the President's power to detain must also be heard, and heard now. It would be fundamentally unfair to Padilla to remand these issues to the Court of Appeals for yet more rounds of proceedings. For the reasons set forth above, however, this Court need not review in this case the wholly proper determination of the Court of Appeals that, after almost 20 months of solitary confinement, Padilla either must be charged with a crime, held as a material witness, or released. No other conclusion comports with the fundamental rule of law on which this country is based.

D. There Are No Compelling Reasons For This Court To Review The Court Of Appeals' Correct Rulings That Secretary Rumsfeld Is A Proper Respondent And Subject To Suit In New York.

The Court of Appeals followed settled precedent of this Court in affirming, unanimously, the District Court's rulings that Secretary Rumsfeld is a proper respondent to Padilla's habeas petition and subject to personal jurisdiction through

New York's long-arm statute. *See* Pet. App. 13a-26a, 61a n.32. In any event, these fact-based determinations do not present an important question; they do not conflict with any other circuit decision in an analogous case; and they do not warrant review on the expedited schedule sought here.

1. At the outset, the issues raised by the Government do not concern the power of the District Court, or of this Court, to resolve this case (and the Government does not suggest otherwise). The Government concedes that Padilla's habeas petition may be heard in a district court of the United States; the issue it raises is *which* district court, and whether that court had personal jurisdiction over Secretary Rumsfeld. *See* Pet. 11 ("[This] case should have proceeded in a different district court in a different circuit."). Courts routinely have held that these issues do not involve the power of the court to hear the case. *See, e.g., Vasquez v. Reno*, 233 F.3d 688, 690 (1st Cir. 2000) (rejecting "out of hand" argument that, if Attorney General was not proper respondent, court would lack subject matter jurisdiction, and viewing issue instead as one involving personal jurisdiction); *West v. Louisiana*, 478 F.2d 1026, 1029 (5th Cir. 1973) ("[f]ailure to name a proper respondent is a procedural rather than a jurisdictional defect"), *adhered to en banc*, 510 F.2d 363, 363 (5th Cir. 1975); 17A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 4268.1 (2d ed. 1988).

2. The Government contends that the Court of Appeals ignored the language of 28 U.S.C. §§ 2242 and 2243, which it interprets as expressly limiting the proper respondent in a habeas proceeding to the petitioner's immediate custodian.[12]

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[12] Section 2242 provides that a habeas application shall include "the name of the person who has custody over him." 28 U.S.C. § 2242. Section 2243 similarly provides that the writ "shall be directed to the person having custody of the person detained." 28 U.S.C. § 2243; *see also* Fed. R. Civ. P. 81(a)(2).

The Government's argument is based on formalistic, territorial notions of jurisdiction that, as the Court of Appeals found, this Court rejected long ago. *See* Pet. App. 14a-21a. To be sure, in the vast majority of cases, the proper respondent in a habeas petition will be the warden of the prison in which the petitioner is incarcerated. *See, e.g., Sanders v. Bennett*, 148 F.2d 19, 20 (D.C. Cir 1945). But this Court has also recognized that the concept of "custodian [is] sufficiently broad" to take into account practical realities that may make it inappropriate to require litigation in the place where the immediate physical custodian is located. *Strait v. Laird*, 406 U.S. at 345-46.

Thus, in *Strait*, the Court allowed litigation to proceed in California even though the proper respondent and actual custodian was located in Indiana. *Id.* at 344.[13] And in *Braden v. 30th Judicial Circuit Court*, this Court allowed a prisoner incarcerated in Alabama to name a Kentucky court as his custodian. 410 U.S. at 495. These cases, as well as others cited by the Court of Appeals in which this Court has allowed someone other than the immediate custodian to be named in a habeas petition, *see* Pet. App. 19a n.15, demonstrate that this Court has never adopted the rigid formalistic rule claimed by the Government.

The Government would distinguish these cases as involving "anomalous situations" that have no bearing on a "traditional" habeas action. Pet. 24-25. Yet this case is hardly "traditional," but rather an unprecedented one that demands the

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[13] The government contends that *Strait* is inapposite because the petitioner was not physically detained. Pet. 25 n.12. The lack of physical detention, however, was not cited as relevant to *Strait*'s reasoning. The petitioner in *Strait* was in custody for purposes of the habeas statute, and the Court held the litigation could continue in a place other than where the petitioner's "custodian" was located. Both the holding and the reasoning of *Strait* fully support the decision below.

same practical reasoning this Court applied in cases like *Braden* and *Strait*.

In any event, this case is wholly fact-bound and unique, and these issues do not warrant review by this Court on an expedited schedule. The *Government* chose to bring Padilla to the Southern District of New York. Counsel was appointed there. Upon order of the President, the Secretary then sent military personnel to New York to take Padilla into an unprecedented, domestic military confinement. The Secretary chose to move Padilla to a military base in South Carolina and may transfer Padilla wherever he wants within the military command. Commander Marr, the ostensible custodian in South Carolina, has no independent authority over Padilla or relevance to the circumstances of his detention. It is the Secretary who has the exclusive power to decide whether or when Padilla's detention will terminate. Unless the domestic seizure of citizens by the military is to become commonplace (or at least until it does), there is no reason for this Court to decide whether the Court of Appeals was correct to follow *Braden* and *Strait* or whether to adopt a new highly-formalistic, strictly-territorial view that would give the Government unprecedented additional powers to dictate the forum where all challenges to its "military seizure authority" may be heard.

Although the Government suggests the decision in this case is at odds with the rulings of other circuit courts, Pet. 22, the courts below correctly found that the circumstances of Padilla's detention presented a unique factual and legal setting on which no circuit court has ever passed. *See* Pet. App. 105a (emphasizing "unprecedented" level of personal involvement by a Cabinet-level officer and that "neither side, and no amicus, has cited a case even remotely similar in this respect."); *id.* 21a (declining to articulate a general rule; "[w]e only hold that,

here, Secretary Rumsfeld is the proper respondent."). Thus, there is no "circuit split" for this Court to resolve.[14]

3. Similarly, every judge below was in agreement that the District Court had personal jurisdiction over the Secretary by virtue of New York's long-arm statute, and there is no compelling reason for this Court to consider that issue either.[15] In *Braden*, this Court could not have been clearer that "[s]o long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' . . . even if the prisoner himself is confined outside the court's territorial jurisdiction." *Braden*, 410 U.S. at 495; *see also Strait*, 406 U.S. at 344 (distinguishing decision in *Schlanger v. Seamans*, 401 U.S. 487 (1971), on the ground that the jurisdictional defect in *Schlanger* was "the total lack of formal contacts between Schlanger and the military in that district").

The unique facts set forth above eliminate any doubt that the Court of Appeals properly determined that personal jurisdiction existed over Secretary Rumsfeld in New York. And those same facts dispel any notion that the court has sanctioned an approach that would "vest virtually every district

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[14] The district court decision in *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003), decided before the Court of Appeals' decision here, certainly does not create a circuit split, and, in any event, the court expressly decided that case on *venue* grounds, and distinguished *Padilla* because lead counsel for *Al-Marri* had no connection to the district. *Id.* at 1005 n.1, 1008. Here, the Government has *not* pursued its venue challenge and therefore has waived the argument. *Compare* Pet. App. 117a *with* Pet. App. 10a n.6 & 10a-26a. In addition, courts that have espoused an "immediate custodian" rule for routine habeas cases have recognized that an exception may be appropriate in an unusual case. *See, e.g., Vasquez*, 233 F.3d at 696; *Guerra v. Meese*, 786 F.2d 414, 417 (D.C. Cir. 1986).

[15] Section 2241(a) provides that "[w]rits of habeas corpus may be granted by . . . the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a).

court in the country with habeas jurisdiction over the amended petition." Pet. 12. Thus, the Government's fears of "forum shopping" are completely unfounded and, indeed, wholly disingenuous here. It is the *Government* that seeks to reserve to itself an unparalleled ability to dictate the forum where challenges to its authority will be heard. And even if it were possible for the Secretary to be served in a district that had no connection to this case, the rules of transfer are adequate to assure that the litigation takes place in an appropriate venue. Pet. App. 117a.

Contrary to the government's contentions, there is nothing in section 2241(a)'s statement that habeas writs may be "granted by the . . . district courts . . . within their respective jurisdictions" that suggests that only a *single* district court could have jurisdiction to grant the writ. No one suggests that a district court may authorize a writ beyond its "respective jurisdiction." Instead, the relevant question is *how* the scope of its respective jurisdiction is determined, and this Court, in a line of cases culminating in *Braden*, has made clear that it is determined by the limits of service of process. *See Braden*, 410 U.S. at 495.

Nor can other statutory language that speaks of "the" district court having power to issue the writ, *see* 28 U.S.C. § 2241(b), be read to mean that in every case there must be only one court that potentially has jurisdiction over the custodian. As the Government itself recognizes, other habeas provisions clearly provide that multiple district courts may have jurisdiction over habeas petitions under certain circumstances. *See* 28 U.S.C. § 2241(d). The Government suggests that these provisions are an exception to a supposed single district rule. Pet. 27. But just as section 2241(d) envisions the possibility of concurrent jurisdiction, so does the "respective jurisdictions" language of section 2241(a), as authoritatively interpreted by this Court in *Braden*. In short, it is the Government's position,

and not the lower courts' ruling, that is in conflict with prior decisions of this Court.

The Government has failed to pursue any argument that venue is improper, *see* n.14, *supra*, or that New York's long-arm statute does not reach petitioner. At bottom, this unprecedented, fact-bound case is not an appropriate vehicle for reconsidering broad questions of procedure in habeas cases, particularly on the expedited schedule sought by the Solicitor General.

E. Respondent Concurs That The Court Should Not Hold The Petition Pending Its Disposition In *Hamdi*.

Respondent concurs with the Government that the Court should grant the Petition rather than hold it pending the Court's decision in *Hamdi v. Rumsfeld*, No. 03-6696, 124 S. Ct. 981 (cert. granted Jan. 9, 2004). *Hamdi*'s resolution likely will not be dispositive of Padilla's habeas petition, as the two cases raise fundamentally different issues: Padilla was detained on American soil, while Hamdi was captured fighting on a foreign battlefield. *See Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) ("To compare this battlefield capture [of Hamdi] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges.") (Wilkinson, J., concurring); *Hamdi v. Rumsfeld*, 316 F.3d 450, 459, 465 (4th Cir. 2003). Padilla already has been held for almost 20 months. It would be an unjustified hardship to force him to wait further for what likely would be post-*Hamdi* proceedings to determine his rights.

CONCLUSION

Respondent respectfully submits that the Petition should be denied. Alternatively, if certiorari is granted, the Court's review should be limited to the two questions presented as restated by respondent. If certiorari is granted, respondent respectfully requests expedited consideration, in the manner proposed by the Solicitor General.

Respectfully submitted,

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No. 03-1027

In the Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
PETITIONER

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent recognizes that this case involves issues "of great national significance" (Br. in Opp. 10), but contends that certiorari nonetheless should be denied, principally on the ground that the court of appeals' decision is correct. Respondent is mistaken. As explained in the petition (at 12-18), the court of appeals' opinion is fundamentally flawed in a number of respects, including in its reading of this Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), and in its interpretation of both 18 U.S.C. 4001(a) and Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224. In any event, there is no question that the opinion raises issues of extraordinary national significance requiring this Court's review.

The President, acting as Commander in Chief in a time of war, determined that Jose Padilla is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war," that he has "engaged in conduct that constituted hostile and war-like acts," that he possesses intelligence that "would aid U.S. efforts to prevent attacks by al Qaeda," that he "represents a continuing, present and grave danger to the national security," and that "it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant." Pet. App. 57a-58a. The court of appeals, in an unprecedented ruling, nullified the President's core wartime judgment as Commander in Chief and ordered Padilla's release from military control. That decision manifestly requires review by this Court, as this Court has indicated by granting certiorari on related issues in *Hamdi* v. *Rumsfeld*, No. 03-6696, cert. granted, 124 S. Ct. 981 (2004). The Court should grant certiorari in this case and schedule it for separate argument

on the same day that *Hamdi* is argued.[1] The Court should also review the court of appeals' conclusion in this case that jurisdiction over the amended petition properly lies in the Southern District of New York.[2]

A. This Court Should Review The Court Of Appeals' Holding That The President Lacks Authority To Seize And Detain Padilla As An Enemy Combatant

1. The President made a determination "for the United States of America" that Padilla's detention as enemy combatant is "necessary to prevent him from aiding al Qaeda," is "in the interest of the United States," and is "consistent with U.S. law and the laws of war." Pet. App. 57a-58a. The court of appeals, in the face of the President's determination, ordered Padilla's release. Such a ruling, by its nature, raises issues of extraordinary significance warranting this Court's review. Accordingly, respondent's arguments that the court of appeals' decision is correct on the merits (Br. in Opp. 11-17) do not diminish the need for review by this Court. Those arguments are mistaken in any event.

a. Respondent acknowledges the military's settled wartime authority to capture and detain enemy combatants, but contends that the authority only encompasses combatants seized "on the battlefield." Br. in Opp. 16. That argument is foreclosed by this Court's decision in *Ex parte Quirin*, which upholds the military detention and trial by military commission of a group of enemy combatants—including one presumed to be an American citizen—seized by FBI agents in Chicago and New York.

[1] In the court of appeals, respondent filed an application for an interlocutory cross-appeal on the question whether the President has authority to detain Padilla as an enemy combatant, arguing that the question was "novel and complex" and that there were substantial grounds for a difference of opinion on the issue. C.A. App. 193-194.

[2] On January 22, 2004, the court of appeals granted petitioner's motion to stay the court's mandate pending this Court's final disposition of the petition for a writ of certiorari.

The *Quirin* Court specifically rejected the suggestion that the combatants were "any the less belligerents if * * * they have not actually committed or attempted to commit any act of depredation *or entered the theatre or zone of active military operations*." 317 U.S. at 38 (emphasis added). The Court explained that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents." *Id.* at 37-38. Padilla fits squarely within that category according to the terms of the President's determination: the President found that Padilla is "closely associated with al Qaeda," that he has engaged in "hostile and war-like acts," and that his detention is "necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." Pet. App. 57a-58a.

Respondent nonetheless submits that *Quirin* "provides no support for Padilla's detention" (Br. in Opp. 17), arguing that *Quirin* involved congressional authorization that is absent here. The *Quirin* saboteurs were tried pursuant to Articles of War providing for trial by military commission of offenses against the laws of war, see 317 U.S. at 26-28, 36, and the relevant provisions remain in effect today, see 10 U.S.C. 821. Although Padilla, unlike the *Quirin* saboteurs, has not been charged with specific war crimes, the Court's opinion makes plain that *all* enemy combatants "are subject to capture and detention * * * by opposing military forces," regardless of whether the combatants "*in addition* * * * are [made] subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 31 (emphasis added).[3]

[3] Respondent observes that the combatants in *Quirin* acknowledged that they were members of the German forces. Br. in Opp. 17. But the court of appeals in this case held that the President lacks authority to de-

Respondent's effort to confine the President's authority to combatants seized on a foreign battlefield is decidedly out of place in the context of the current conflict against al Qaeda. As is starkly illustrated by the nature of the savage attacks of September 11, 2001, al Qaeda has extended the battle far beyond traditional notions of battlefield combat and aims to perpetrate surreptitious and large-scale attacks against civilian targets well outside any conventional zone of combat. Particularly in view of the nature of the current conflict, there is no basis for nullifying the authority recognized by *Quirin* for the military to seize and detain enemy combatants wherever found.

b. Respondent also errs in arguing (Br. in Opp. 11-15) that 18 U.S.C. 4001(a) bars Padilla's detention as an enemy combatant. Respondent makes no suggestion that Section 4001(a) could prohibit the detention of an American citizen seized while fighting against the United States in the course of conventional battlefield combat. See *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 467-468 (4th Cir. 2003), cert. granted, 124 S. Ct. 981 (2004). Nothing in the statutory terms—which purport to regulate detentions, not place of capture—supports a different result in the circumstances of this case. The statute, properly construed, does not pertain to the wartime detention of enemy combatants at all. Moreover, construing the statute to constrain the President's basic authority to capture and detain enemy combatants would raise serious separation-of-powers concerns. See Pet. 17-18.[4]

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tain Padilla on the assumption—as is described in the Mobbs Declaration—that Padilla trained with al Qaeda and came to the United States intending to advance the conduct of further hostile actions by al Qaeda.

[4] Respondent stresses that 18 U.S.C. 4001(a) "repealed a statute that specifically concerned detention of spies and saboteurs in time of war," Br. in Opp. 13, but does not mention that the statute, the Emergency Detention Act of 1950, 50 U.S.C. 811 *et seq.*, gave that authority to the Attorney General. See Pet. 17 n.6. That fact, along with the statute's location in Title 18, underscore that it limits detention by civilian officials, not the wartime detention of enemy combatants by the military.

In any event, Congress's Authorization for Use of Military Force supplies an ample statutory basis for Padilla's detention. Although respondent suggests that Congress did not intend to support the detention of a combatant "seized outside a zone of combat" (Br. in Opp. 15), the statutory terms contain no suggestion that the President lacks authority outside the context of conventional battlefield combat. To the contrary, Congress acted in direct response to attacks carried out far from any traditional zone of combat, Congress specifically found it "necessary and appropriate * * * to protect United States citizens both *at home* and abroad," and Congress recognized the President's authority "to take action to *deter* and *prevent* acts of international terrorism against the United States." 115 Stat. 224 (emphasis added). Padilla's detention thus falls comfortably within the broad terms of Congress's Authorization. See *Quirin*, 317 U.S. at 26 ("The Constitution * * * invests the President, as Commander in Chief, with the power to * * * carry into effect all laws passed by Congress for the conduct of war.").[5]

2. Respondent contends (Br. in Opp. 17-18) that the court of appeals' ruling is narrow and works no interference with

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[5] Respondent goes so far as to argue (Br. in Opp. 15 n.10, 18) that Padilla's detention falls outside the scope of Congress's Authorization because Padilla *himself* did not "plan[], authorize[], commit[], or aid[] the terrorist attacks that occurred on September 11, 2001," § 2(a), 115 Stat. 224. That argument is specious. Congress supported the President's use of force against, *inter alia*, "organizations" that "he determines planned, authorized, committed, or aided" the September 11 attacks (*ibid.*), and al Qaeda indisputably is such an "organization." Of course, "[o]rganizations such as al Qaeda are comprised of people," Pet. App. 70a (Wesley, J., dissenting), and the President determined that Padilla is "closely associated" with al Qaeda and has engaged in "hostile and war-like acts," *id.* at 57a, making clear that Padilla falls within the sweep of Congress's Authorization. See *id.* at 68a-70a (Wesley, J., dissenting).

the President's ability to preserve the national security in wartime. That argument is unavailing. The President made a determination as Commander in Chief that Padilla "represents a continuing, present and grave danger to the national security," and that "it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant." Pet. App. 58a.

Respondent emphasizes (Br. in Opp. 18) that Padilla was not engaged in imminent hostilities at the moment of his initial seizure and was already detained by law enforcement before his transfer to military control. But the *Quirin* saboteurs likewise had been taken into custody by FBI agents before being transferred to military control, 317 U.S. at 21-23, and this Court made clear that it was immaterial whether they had "actually committed or attempted to commit any act of depredation" when they were initially seized, *id.* at 38. There thus is no basis for requiring the military to wait to seize an enemy combatant who has "engaged in conduct that constituted hostile and war-like acts" (Pet. App. 57a) and aims to aid the enemy in its efforts to attack the United States. Moreover, the President determined that Padilla possesses "intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States." *Id.* at 57a-58a. The prospect of Padilla's transfer to civilian authorities in lieu of an outright release (see Br. in Opp. 18) thus in no way detracts from the President's determination that the national interest requires Padilla's detention as an enemy combatant.

B. The Court Of Appeals' Opinion Does Not Raise Any Issues Concerning The Extent To Which Padilla May Raise A Factual Challenge To The Determination That He Is An Enemy Combatant

Respondent submits (Br. in Opp. 19-23) that, if the Court grants certiorari, it should extend its review beyond the

questions presented by the petition to address the extent to which Padilla may challenge the factual basis for the President's determination that he is an enemy combatant, including the standards of review for any such challenge and whether Padilla would be entitled to meet with counsel. Those issues are not properly presented by the court of appeals' decision. The court of appeals accepted the factual basis for Padilla's detention laid out in the Mobbs Declaration, and it ruled as a matter of law that the President lacks authority under those facts to detain Padilla as an enemy combatant. The court therefore explained that its decision "effectively moots arguments * * * concerning access to counsel, standard of review, and burden of proof." Pet. App. 4a n.1.[6]

This Court's usual practice is to confine its review to questions squarely raised by the opinion below rather than reaching out to resolve issues left unaddressed by the decision under review. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) ("we do not ordinarily consider questions not specifically passed upon by the lower court"); *Ralston* v.

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[6] As counsel for petitioners explained during oral argument before the court of appeals in November 2003, the Department of Defense (DOD), as a matter of discretion and military policy, has adopted a policy of permitting access to counsel by an enemy combatant who is a United States citizen and who is detained by the military in the United States, when DOD has determined that such access will not compromise the national security of the United States, and when DOD has determined either that it has completed intelligence collection from the enemy combatant or that granting access to counsel would not interfere with such intelligence gathering. See 11/17/03 Tr. 82-84, 113, 123-124. In accordance with DOD's policy and the military's ongoing evaluation of Padilla's detention, DOD has determined that Padilla may be permitted access to counsel subject to appropriate security restrictions. See http://www.defenselink.mil/releases/2004/nr20040211-0341.html. That decision, along with the Second Circuit's own recognition that its broad ruling rendered arguments concerning access to counsel "effectively moot," counsel in favor of confining review to the questions presented in the petition.

Robinson, 454 U.S. 201, 220 n.14 (1981). Adherence to that practice is especially warranted where, as here, the Court is asked to decide sensitive and complex issues that have yet to be addressed by any court of appeals. Moreover, because the court of appeals invalidated Padilla's detention as a matter of law and ordered his release, Pet. App. 3a, 55a, any ruling by this Court on the extent to which Padilla may challenge the factual basis for the determination that he is an enemy combatant could result, at most, in modification (rather than affirmance) of the judgment below. And "[a]n argument that would modify the judgment even in a way that provides less relief cannot be presented without filing a * * * cross-petition," which respondent has not done. Robert L. Stern, et al., *Supreme Court Practice* 444 (8th ed. 2002); see *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976). The Court thus should decline respondent's invitation to resolve issues not addressed by the court of appeals' decision, and should limit the grant of certiorari to the questions presented in the petition.[7]

C. This Court Should Review The Court Of Appeals' Conclusion That The District Court Has Jurisdiction Over The Proper Respondent To The Amended Habeas Petition

As the petition explains (at 21-28), the court of appeals' holding that the district court properly asserted habeas jurisdiction in this case is inconsistent with decisions of other

[7] Respondent "concurs with the Government that the Court should grant the petition [in this case] rather than hold it pending the Court's decision in *Hamdi*." Br. in Opp. 29. Because the issues in the two cases are related, the petition, at a minimum should be held pending the disposition in *Hamdi*. As the petition explains, however (at 20), the issues are sufficiently distinct that the Court should grant the petition here and schedule this case for separate oral argument on the same day as argument in *Hamdi*.

courts of appeals and should be reviewed by this Court. Respondent's arguments against review are unpersuasive.

1. A long line of decisions establishes that the proper respondent in a habeas challenge to present physical confinement is the detainee's immediate custodian. See Pet. 21-26. Respondent submits (Br. in Opp. 25) that this Court's decisions in *Strait* v. *Laird*, 406 U.S. 341 (1972), and *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973), demonstrate a more flexible approach. But *Strait* did not involve a challenge to physical detention and hence involved no physical custodian, see 406 U.S. at 344; and in *Braden*, the detainee challenged a detainer lodged against him by another jurisdiction rather than his present physical confinement, 410 U.S. at 499-500. Accordingly, courts of appeals other than the Second Circuit below have viewed *Strait* and *Braden* as casting no doubt on the applicability of the immediate custodian rule in a typical habeas action challenging present physical confinement. As noted in the petition (at 25-26), therefore, the extent to which *Strait* and *Braden* permit deviating from the immediate custodian rule is the subject of disagreement among the courts of appeals. See *Vasquez* v. *Reno*, 233 F.3d 688, 695-696 (1st Cir. 2000) (*Strait* "cannot plausibly be read * * * to consign to the scrap heap the substantial body of well-reasoned authority holding that a detainee must name his immediate custodian as the respondent."), cert. denied, 534 U.S. 816 (2001); *Monk* v. *Secretary of the Navy*, 793 F.2d 364, 369 (D.C. Cir. 1986) (holding that "[n]othing in *Braden* supports" departing from immediate custodian rule).

The factual distinctions raised by respondent are immaterial. Respondent observes (Br. in Opp. 26) that the government elected to detain Padilla at the Naval Consolidated Brig, Charleston, South Carolina. But the government also determines where to detain prisoners in criminal confinement, and it is undisputed that the immediate custodian rule

governs habeas actions brought by prisoners under 28 U.S.C. 2241. Respondent also emphasizes (Br. in Opp. 26) that Secretary Rumsfeld, rather than Padilla's immediate custodian, has independent authority to determine when Padilla's detention will terminate. No immediate custodian has such authority, however (see Pet. 24-25), yet courts consistently adhere to the immediate custodian rule. See *Robledo-Gonzales* v. *Ashcroft*, 342 F.3d 667, 673 (7th Cir. 2003) (detainee must name immediate custodian as respondent rather than supervisory official who has "power to control some aspect of the petitioner's legal process").

2. As the petition explains (at 21, 26-27), the habeas statutes direct that a district court has jurisdiction over a petition only if the respondent is located within the district's territorial boundaries. Respondent argues (Br. in Opp. 27-28) that *Braden* establishes that jurisdiction in a habeas case extends to any custodian who can be reached by the long-arm statute of the State in which the district court sits. That contention cannot be squared with the view of the D.C. Circuit, which has held that *Braden* affords no basis for departing from the rule that habeas "jurisdiction is proper only in the district in which the immediate * * * custodian is located." *Monk*, 793 F.2d at 369. Respondent does not discuss that decision or deny that it is inconsistent with the opinion below.

* * * * *

For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

FEBRUARY 2004

FEB 20 PAGE 1ST

(3)

Supreme Court, U.S.
FILED
FEB 13 2004
OFFICE OF THE CLERK

No. 03-1027

IN THE

Supreme Court of the United States

DONALD RUMSFELD,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

Pursuant to Supreme Court Rule 15.8, respondent submits this supplemental brief to call attention to intervening matter not available at the time of respondent's last filing.

The Government's assertion in this case of a novel and unprecedented Presidential power to imprison Jose Padilla indefinitely without any charges or trial necessarily raises fundamental questions concerning the scope of that authority, including: to whom this power may be applied; what type of conduct would subject an individual to this authority; what proof of that conduct is required and how is it reviewed; and whether there are limits on the duration of the detention. It is meaningless to ask whether the President has "authority" in this case without attempting to define what that authority is. And these questions necessarily must be considered in the context of this actual case, where the Government asks this Court to find authority for the President's continued detention of Mr. Padilla and to reverse the judgment of the Court of Appeals that – after 20 months of imprisonment in a military jail – Padilla either must be charged with a crime, detained as a material witness, or released.

The obvious need for the Court to consider these questions is not affected by the Government's surprise announcement earlier this week, as referenced in its reply brief filed that same day, *see* Reply Br. at 7 n.6, that Padilla suddenly would be allowed highly limited access to counsel. Two points are important.

First, the Government continues to deny that Padilla has any right to consult with the lawyers appointed by the District Court. As the Department of Defense (DoD) press release cited by the Government states: "DoD is allowing Padilla access to counsel as a matter of discretion and military authority. Such access is not required by domestic or international law and

should not be treated as a precedent."[1] Thus, the Government may change its allegedly discretionary decision at any time.

Second, the conditions that the Government seeks to impose on any meeting between counsel and Padilla are so restrictive that such a meeting cannot be viewed in any meaningful sense as an attorney-client meeting. A DoD official will be present during any conversation, and the conversation will be videotaped and monitored by intelligence officials.[2]

For these reasons, the new facts created by the Government and disclosed in its reply brief should have no bearing on this Court's consideration and disposition of the Petition.

Respectfully submitted,

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[1] News Release, *Padilla Allowed Access to Lawyers* (Feb. 11, 2004), at http://www.defenselink.mil/releases/2004/nr20040211-0341.html.

[2] *See* Shannon McCaffrey, *Alleged Dirty Bomb Plotter Given Access to Lawyer*, Knight-Ridder Newspapers, Feb. 11, 2004, *at* http://www.realcities.com/mld/krwashington/7931181.htm.

SUPREME COURT, U.S.
FILED
MAR 17 2004
OFFICE OF THE CLERK

No. 03-1027

In the Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
PETITIONER

v.

JOSE PADILLA AND DONNA R. NEWMAN, AS NEXT
FRIEND OF JOSE PADILLA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: JAN. 16, 2004
CERTIORARI GRANTED: FEB. 20, 2004

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

02-CV-0445-MBM

JOSE PADILLA, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT;
GEORGE W. BUSH, DONALD H. RUMSFELD,
M. A. MARR, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
06/12/2002		Magistrate Judge James C. Francis is so designated. (jol) (Entered: 06/14/2002)
06/12/2002	2	ORDER, petitioner has submitted a petition for writ of habeas that contains material pertaining to a grand jury proceeding which will be filed under seal. The parties have agreed that the attached redacted copy of the petition may be publicly filed. Accordingly, the Clerk of the Court is directed to open this matter as a new civil

DATE	DOCKET NUMBER	PROCEEDINGS
		action and serve a copy of this order and the redacted copy of the petition on the Secretary of Defense in care of Paul W. Cobb, Jr., Deputy General Counsel, Department of Defense, Pentagon, Room 3C975, 1600 Defense Pentagon, Washington, D.C. 20310-1600. As agreed to by the parties the government will file a motion to dismiss or transfer the petition by 6/21/02. Answering papers are to be served by 7/2/02. A reply may be served by 7/9/02. Copies mailed via certified mail #7000-1530-0005-4709-9705 on 6/14/02. (signed by Chief Judge Michael B. Mukasey on 6/12/02). (ph) Modified on 06/14/2002 (Entered: 06/14/2002)
06/12/2002	1	PETITION for writ of habeas corpus pursuant to 28 USC 2241. (jol) Modified on 06/26/2002 (Entered: 06/26/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
06/17/2002	3	SEALED DOCUMENT placed in vault. (js) (Entered: 06/18/2002)
06/20/2002	4	AMENDED PETITION FOR Writ of Habeas Corpus by Jose Padilla amending [1-1] petition. (ae) (Entered: 06/28/2002)
06/20/2002	5	AFFIDAVIT OF SERVICE of Amended Petition for Writ of Habeas Corpus as to U.S.A. by hand delivery c/o U.S. Attorney's officer at One Saint Andrew's Plaza, w/enclosed sealed envelope addressed to the following people: Eric Bruce, Esq., Asst. U.S. Atty.; John Ashcroft, Atty. General; George W. Bush, President of the U.S.; Donald Rumsfeld, Secretary of Defense; Commander M.A. Marr; Co[n]-solidated Naval Brig on 6/20/02. Answer to Amended Petition for Writ of Habeas Corpus due on 7/10/02 for U.S.A. (ae) (Entered: 06/28/2002)
06/26/2002	6	NOTICE OF MOTION by U.S.A.; for an order to dismiss the amended petition for writ of habeas corpus. No Return Date (Filed in the night deposit on

DATE	DOCKET NUMBER	PROCEEDINGS
		6/26/02 at 7:18 p.m.) (ae) Modified on 06/28/2002 (Entered: 06/27/2002)
06/26/2002	7	ORDER, Deadline for filing of the govt's motion to dismiss or transfer the amended petition by 6/26/02; Response to motion deadline 7/11/02; Reply to response to motion deadline 7/18/02 (signed by Chief Judge Michael B. Mukasey); Copies mailed. (cd) Modified on 06/28/2002 (Entered: 06/27/2002)
07/12/2002	8	NOTICE OF MOTION for leave to file Brief as Amici Curiae, by NYS Association of Criminal Defense Lawyers and the National Association of Criminal Defense Lawyers ; Return Date 7/22/02 at 9:30; attached is the prospective brief (cd) Modified on 07/16/2002 (Entered: 07/16/2002)
07/18/2002	9	REPLY by U.S.A. in support of their: [6-1] motion for an order to dismiss the amended petition for writ of habeas corpus. Received in night deposit box on 7/18/02 at 10:55 p.m. (yv) Modified on 07/22/2002 (Entered: 07/22/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
08/12/2002	10	ORDER, for Paul D. Clement to appear pro hac vice for respondent ; Deadline for filing of respondent motion (merits) by 8/23/02; Response to motion deadline 9/13/02; Reply to response to motion deadline 9/20/02 (signed by Chief Judge B. Mukasey); Copies mailed; forwarded orig. doc. to the Attorney Admissions Clerk (cd) Modified on 08/14/2002 (Entered: 08/13/2002)
08/27/2002	12	RESPONSE by U.S.A. Re: [4-1] amended petition. Received in night deposit box on 8/27/02 at 7:53 p.m. (yv) (Entered: 09/04/2002)
09/03/2002	11	Transcript of record of proceedings before Chief Judge Michael B. Mukasey for the date(s) of July 31, 2002. (jw) (Entered: 09/03/2002)
09/19/2002	15	Letter filed by U.S.A. addressed to Clerk of Court from Paul D. Clement, dated 9/19/02, re: Mobbs Declaration. Mobbs Declaration attached. (dle) (Entered: 09/30/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
09/24/2002	13	ORDER, the American Civil Liberties Union is granted leave to file an amicus curiae brief in this matter. The Clerk of the Court is directed to receive and file such a brief (signed by Chief Judge Michael B. Mukasey); (cd) (Entered: 09/26/2002)
09/26/2002	14	ORDER; on application by petitioner, and consent of respondent, the statement in the 5/8/02, affidavit in support of the material witness warrant herein to the effect that petitioner indicated he was unwilling to become a martyr is unsealed. (signed by Chief Judge Michael B. Mukasey) (Copy forwarded to Sealed Records Clerks) (sn) Modified on 09/26/2002 (Entered: 09/26/2002)
09/26/2002	17	BRIEF by Jose Padilla in support of [4-1] amended petition, and in response to [6-1] motion for an order to dismiss the amended petition for writ of habeas corpus. Received in the night deposit box on 9/26/02 at 6:35 p.m. (sb) Modified on 10/03/2002 (Entered: 10/03/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
09/26/2002	18	BRIEF submitted on behalf of the American Civil Liberties Union, New York Civil Liberties Union and Center for National Security Studies as Amici Curiae. (sb) (Entered: 10/03/2002)
09/27/2002	16	SUPPLEMENTAL BRIEF OF AMICI CURIAE by The N.Y.S. Assoc. of Criminal Defense Lawyers and the Natl. Assoc. of Criminal Defense Lawyers (pl) (Entered: 10/02/2002)
10/11/2002	19	REPLY by U.S.A. to response to [6-1] motion for an order to dismiss the amended petition for writ of habeas corpus; (docmt received in night dep. at 6:10 p.m. on 10/11/02) (djc) (Entered: 10/22/2002)
10/21/2002	20	Letter filed by Jose Padilla addressed to Judge Mukasey from Donna R. Newman, dated 10/16/02, re: petitioner's status as an enemy combatant (cd) (Entered: 10/24/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
10/21/2002	21	ORDER; At the court's request, the parties will submit further briefs on the issues of petitioner's right to counsel and the propriety of the government's sealed affidavit, and the government will address, to the extent it wishes, the issues raised in petitioner's sur-reply submission, by 10/28/02. The parties may submit replies by 10/31/02. (signed by Chief Judge Michael B. Mukasey); (kg) (Entered: 10/24/2002)
10/22/2002	23	Letter filed by Jose Padilla addressed to Judge Mukasey from Andrew G. Patel, Esq., dated 8/28/02, re: requesting that the Court not yet consider what the Government describes as "a classified ver[si]on of the Mobbs Declaration . . ." (kw) (Entered: 10/30/2002)
10/22/2002	24	Letter filed by U.S.A. addressed to Judge Mukasey from Paul D. Clement, dated 8/29/02, re: in response to defense counsel's 8/28/02 letter. (kw) (Entered: 10/30/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
10/22/2002	25	Letter filed by Jose Padilla addressed to Judge Mukasey from Andrew G. Patel, Esq., dated 9/6/02, re: in reply to the Government's letter dated 8/29/02. (kw) (Entered: 10/30/2002)
10/28/20022	22	ORDER; petitioner will serve the government 10/28/02, by electronic mail with the brief required by the Court's 10/21/02 Order, and petitioner will file that brief with the Court on 10/29/02, so that he can include therewith a document cited in the brief but not yet received by petitioner's counsel. This procedure will enable the government to receive petitioner's arguments and respond to them, as provided in the 10/21/02 Order, by 10/31/02. (signed by Chief Judge Michael B. Mukasey) (sn) (Entered: 10/28/2002)
10/28/2002	26	RESPONSE to this Court's 10/21/02 Order by U.S.A. (pl) (Entered: 10/30/2002)
10/29/2002	27	SUPPLEMENTAL MEMORANDUM OF LAW by Jose Padilla re: appointment of counsel (cd) (Entered: 10/31/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
11/01/2002	28	ORDER, The caption of this action is amended to read: Jose Padilla v. George W. Bush, Donald Rumsfeld, and Commander M.A. Marr. The parties' request to extend by one day the deadline for reply papers is granted, and those papers will be submitted by 11/1/02. (signed by Chief Judge Michael B. Mukasey) (sb) (Entered: 11/04/2002)
11/01/2002	29	RESPONSE by U.S.A. Re: [27-1] memorandum (cd) (Entered: 11/06/2002)
11/01/2002	30	SUPPLEMENTAL REPLY MEMORANDUM by Jose Padilla. (sac) (Entered: 11/06/2002)
12/04/2002	31	OPINION and ORDER #87780; Newman may pursue this petition as next frie[n]d to Padilla, and the gover[n]me[n]t's motion to dismiss for lack of standing therefore is denied; Secretary Rumsfeld is the proper respondent in this case, and th[i]s court has jurisdiction over him, as well as jurisdiction to hear this case, and the government's motion to dismiss for lack of jurisdiction is

DATE	DOCKET NUMBER	PROCEEDINGS
		denied; the Government's motion to transfer to South Carolina, is denied; the President is authorized under the Constitution and by law to direct the military to detain enemy combatants in the circumstances present here, such that Padilla's detention is not per se unlawful; the Court will not at this time use the document submitted in camera to determine whether the government has met the standard as stated in this memorandum opinion; the parties will discuss and arrange the conditions for defense counsel's consultation with Padilla and will attend a conference on 12/30/02 at 9:15 a.m. in Courtroom 21B of the United States Courthouse, 500 Pearl Street, NY, NY 10007, to report on the results of those discussions and arrangements, and to schedule further proceedings in this case; (signed by Chief Judge Michael B. Mukasey); (djc) (Entered: 12/04/2002)
2/06/2002	32	Transcript of record of proceedings before Chief Judge Michael B. Mukasey for the date(s) of

DATE	DOCKET NUMBER	PROCEEDINGS
		10/21/02. (dt) (Entered: 12/06/2002)
12/26/2002	33	ORDER, the conference scheduled in the case is adjourned to 1/15/03 at 9:15 a.m. in Room 21B of the US Courthouse, 500 Pearl Street, New York, NY 10007; Respondents are to serve their written submission by 1/8/03. If necessary, the Court will establish at the 1/15/03 conference a date by which petitioner is to respond to that submission. (signed by Chief Judge Michael B. Mukasey); (kw) (Entered: 12/27/2002)
01/09/2003	34	ORDER, on respondents' unopposed application on 1/8/03 the time in which respondents are to serve their written submission is extended to 1/9/03. The parties are reminded that a conference will be held in the case on 1/15/03 at 9:15 a.m. in Room 21B. (signed by Chief Judge Michael B. Mukasey); (cd) Modified on 01/14/2003 (Entered: 01/13/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
01/09/2003	35	NOTICE OF MOTION by Donald H. Rumsfeld, M. A. Marr for reconsideration of [31-1] order Newman may pursue this petition as next frie[n]d to Padilla, and the gover[n]me[n]t's motion to dismiss for lack of standing therefore is denied, [31-2] order Secretary Rumsfeld is the proper respondent in this case, and th[i]s court has jurisdiction over him, as well as jurisdiction to hear this case, and the government's motion to dismiss for lack of jurisdiction is denied, [31-3] order the Government's motion to transfer to South Carolina, is denied, [31-4] order the President is authorized under the Constitution and by law to direct the military to detain enemy combatants in the circumstances present here, such that Padilla's detention is not per se unlawful, [31-5] order the Court will not at this time use the document submitted in camera to determine whether the government has met the standard as stated in this memorandum opinion, [31-6] order the

DATE	DOCKET NUMBER	PROCEEDINGS
		parties will discuss and arrange the conditions for defense counsel's consulta[ti]ton with Padilla and will attend a conference on 12/30/02 at 9:15 a.m. in Courtroom 21B of the United States Courthouse, 500 Pearl Street, NY, NY NY, NY 10007, to report on the results of those discussions and arrangements, and to schedule further proceedings in this case, [31-7] order. Return Date not indicated. Received in night deposit box on 1/9/03 at 9:23 p.m. (yv) (Entered: 01/14/2003)
01/13/2003	36	RESPONSE by Jose Padilla to [35-1] motion for reconsideration of [31-1] order Newman may pursue this petition as next frie[n]d to Padilla, and the gover[n]-me[n]t's motion to dismiss for lack of standing therefore is denied, [31-2] order Secretary Rumsfeld is the proper respondent in this case, and th[i]s court has jurisdiction over him, as well as jurisdiction to hear this case, and the government's motion to dismiss for lack of jurisdiction is de

DATE	DOCKET NUMBER	PROCEEDINGS
		nied, [31-3] order the Govern motion to transfer to South Carolina, is denied, [31-4] order the President is authorized under the Constitution and by law to direct the military to detain enemy combatants in the circumstances present here, such that Padilla's detention is not per se unlawful, [31-5] order the Court will not at this time use the document submitted in camera to determine whether the government has met the standard as stated in this memorandum opinion, [31-6] order the parties will discuss and arrange the conditions for defense counsel's consulta[ti]ton with Padilla and will attend a conference on 12/30/02 at 9:15 a.m. in Courtroom 21B of the United States Courthouse, 500 Pearl Street, NY, NY NY, NY 10007, to report on the results of those discussions and arrangements, and to schedule further proceedings in this case, [31-7] order (sac) (Entered: 01/15/2003)
01/15/2003	37	AFFIRMATION of Andrew G. Patel by Jose Padilla. (db) (Entered: 01/22/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
01/21/2003	38	ORDER, respondents are to serve answering papers to petitioner's cross-motion to strike their motion for reconsideration; respondents' Reply to Response to Motion set for 5:00 p.m. on 1/22/03 re: [35-1] motion for reconsideration of [31-1] order Newman may pursue this petition as next frie[n]d to Padilla, and the gover[n]ment's motion to dismiss for lack of standing therefore is denied, [31-2] order Secretary Rumsfeld is the proper respondent in this case, and th[i]s court has jurisdiction over him, as well as jurisdiction to hear this case, and the government's motion to dismiss for lack of jurisdiction is denied, [31-3] order the Government's motion to transfer to South Carolina, is denied, [31-4] order the President is authorized under the Constitution and by law to direct the military to detain enemy combatants in the circumstances present here, such that Padilla's detention is not per se unlawful, [31-5] order the Court will not at this time use the

DATE	DOCKET NUMBER	PROCEEDINGS
		document submitted in camera to determine whether the government has met the standard as stated in this memorandum opinion, [31-6] order the parties will discuss and arrange the conditions for defense counsel's consulta[ti]on with Padilla and will attend a conference on 12/30/02 at 9:15 a.m. in Courtroom 21B of the United States Courthouse, 500 Pearl Street, NY, NY NY, NY 10007, to report on the results of those discussions and arrangements, and to schedule further proceedings in this case, [31-7] order. A reply as to the cross-motion may be served by 5:00 p.m. on 1/29/03. (signed by Chief Judge Michael B. Mukasey); (kw) (Entered: 01/23/2003)
01/22/2003	39	REPLY MEMORANDUM by U.S.A., George W. Bush, Donald H. Rumsfeld, M. A. Marr in support of [6-1] motion for an order to dismiss the amended petition for writ of habeas corpus. Received in the night deposit box on 1/22/03 at 5:14 p.m. (sb) (Entered: 01/28/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
01/29/2003	41	REPLY by Jose Padilla submitted in further support of peti-t[i]oners' motion to strike respondent's motion for reconsideration in part ("motion") and/or deny respondent's motion on its merits. (jco) (Entered: 02/04/2003)
01/30/2003	40	ORDER, the caption of this case is amended as set forth in this Order; Petitioner is to file and serve the "written response" referred to in footnote 1 on page 1 of his reply memorandum by 5:00 p.m. on February 5, 2003; (signed by Chief Judge Michael B. Mukasey); (djc) (Entered: 02/03/2003)
02/06/2003	42	ORDER, that on application by petitioner on 2/5/03, the time in which petit[i]oner is to file and serve the "written response" referred to in footnote 1 on page 1 of his reply memorandum is extended to 5:00 p.m. on 2/7/03. (signed by Chief Judge Michael B. Mukasey). (tp) (Entered: 02/07/2003)
02/07/2003	43	MEMORANDUM OF LAW by Jose Padilla re: Some Evidence. (laq) (Entered: 02/13/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
02/11/2003	44	BRIEF of AMICI CURIAE by The New York State Association of Criminal Defense Lawyers and The National Association of Criminal Defense Lawyers. (db) (Entered: 02/24/2003)
03/03/2003	45	Transcript of record of proceedings before Chief Judge Michael B. Mukasey for the date(s) of January 15, 2003. (dt) (Entered: 03/03/2003)
03/11/2003	46	OPINION AND ORDER #03/11/03, granting [35-1] motion for reconsideration of [31-1] order Newman may pursue this petition as next frie[n]d to Padilla, and the gover[n]ment's motion to dismiss for lack of standing therefore is denied, [31-2] order Secretary Rumsfeld is the proper respondent in this case, and th[i]s court has jurisdiction over him, as well as jurisdiction to hear this case, and the government's motion to dismiss for lack of jurisdiction is denied, [31-3] order the Government's motion to transfer to South Carolina, is denied, [31-4] order the President is authorized

DATE	DOCKET NUMBER	PROCEEDINGS
		under the Constitution and by law to direct the military to detain enemy combatants in the circumstances present here, such that Padilla's detention is not per se unlawful, [31-5] order the Court will not at this time use the document submitted in camera to determine whether the government has met the standard as stated in this memorandum opinion, [31-6] order the parties will discuss and arrange the conditions for defense counsel's consulta[ti]on with Padilla and will attend a conference on 12/30/02 at 9:15 a.m. in Courtroom 21B of the United States Courthouse, 500 Pearl Street, NY, NY NY, NY 10007, to report on the results of those discussions and arrangements, and to schedule further proceedings in this case, [31-7] order; that the parties will attend a conference at 9:15 a.m. on 3/27/03, in rm 21B, for the purpose of reporting on their consultations in the manner as stated in this Opinion and Order, any party wishing [to] apprise the

DATE	DOCKET NUMBER	PROCEEDINGS
		court in writing of any issues remaining after such consultations will do so by 5 p.m. on 3/25/03. (signed by Chief Judge Michael B. Mukasey); (pl) Modified on 03/13/2003 (Entered: 03/12/2003)
03/25/2003	47	Letter filed by Jose Padilla addressed to Judge Mukasey from Andrew G. Patel & Donna R. Newman, dated 3/24/03, re: the conditions involving the the meeting of persons Ms. Newman and Mr. Padilla. (db) (Entered: 03/26/2003)
03/25/2003	48	Letter filed by Jose Padilla addressed to Judge Mukasey from Donna R. Newman, dated 3/24/03, re: objection to respondents request for certification of appeal. (db) (Entered: 03/26/2003)
03/25/2003	49	Letter filed by U.S.A. addressed to Judge Mukasey from James B. Comey, dated 3/20/03, re: continual belief that Mr. Padilla poses danger to the national security of the United States. (db) (Entered: 03/26/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
03/31/2003	50	NOTICE OF MOTION by U.S.A., George W. Bush, Donald H. Rumsfeld, M. A. Marr for an order for certification for interlocutory appeal of the Court's 12/4/02 and 3/11/03 orders and for ar order for a stay of the proceedings pending resolution of the appeal. No Return Date. Received in the night deposit box on 6:46 p.m. (sb) (Entered: 04/01/2003)
04/03/2003	51	OPPOSITION by Jose Padilla re: [50-1] motion for an order for certification for interlocutory appeal of the Court's 12/4/02 and 3/11/03 orders, [50-2] motion for an order for a stay of the proceedings pending resolution of the appeal (pl) (Entered: 04/07/2003)
04/09/2003	52	OPINION AND ORDER #88333, granting [50-1] motion for an order for certification for interlocutory appeal of the Court's 12/4/02 and 3/11/03 orders; the opinions and orders entered in this case on 12/4/02 and 3/11/03 are deemed amended to include

DATE	DOCKET NUMBER	PROCEEDINGS
		the discussions set forth in this Opinion and Order. (signed by Chief Judge Michael B. Mukasey); (pl) (Entered: 04/10/2003)
05/01/2003	53	Transcript of record of proceedings before Chief Judge Michael B. Mukasey for the date(s) of 3/27/03. (pr) (Entered: 05/01/2003)
05/12/2003		Documents # 4,12,17 SENT TO THE USCA, ATT. AMY SMITH. (pr) (Entered: 05/12/2003)
05/16/2003	54	Notice that the record on appeal has been certified and transmitted to the U.S. Court of Appeals. (There is no Notice of Appeal filed in U.S. Di[s]trict Court, Filed 1292(b) in U.S. Court of Appeals. (dt) Modified on 05/16/2003 (Entered: 05/16/2003)
05/16/2003		by U.S.A., George W. Bush, Donald H. Rumsfeld, M. A. Marr, Indexed record on appeal files (03-2235) sent to the U.S.C.A. (dt) (Entered: 05/16/2003)
06/19/2003	55	SEALED DOCUMENT placed in vault. (js) (Entered: 06/19/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
06/20/2003	56	True Copy of Order from the USCA RE: Appellant petitions pursuant to 28 USC 1292(b), for leave to appeal the district court orders dated December 4, 2002 and March 11, 2003 and to expedite the interlocutory appeal if permitted. Appellee-cross appellant petitions, pursuant to 1292(b), for leave to appeal the portion of the district court order finding that the President had the authority to order the military to seize and detain Padilla as stated. ORDERED that the petitions are GRANTED AS STATED. It is further ORDERED that the motion to expedite the appeal is GRANTED. Opening briefs by both sides shall be filed no later than July 22, 2003. Response bri[e]fs by both shall be filed by no later than August 12, 2003. Reply bri[e]fs by both sides shall be filed by no later than September 1, 2003. Counsel are hereby advised that oral argument in this matter will be heard on a date set by the court no earlier than the week of October 12, 2003.

DATE	DOCKET NUMBER	PROCEEDINGS
		CERTIFIED 6/11/03, 03-2235. MACKECHNIE, CLERK, USCA. (pr) (Entered: 07/02/2003)
07/16/2003	57	SEALED DOCUMENT placed in vault. (js) (Entered: 07/16/2003)
07/16/2003	58	SEALED DOCUMENT placed in vault. (js) (Entered: 07/16/2003)
08/04/2003	59	ORDER; because of the length of this case, petitioner's CJA attorneys, Donna Newman and Andrew Patel, may submit interim vouchers for representation of their client. Ms. Newman and Mr. Patel may be reimbursed for out-of-pocket expenses reasonable incurred to their representation. They are to incur no single expense item in excess of $150.00 without making an exparte application to the Clerk stating the nature of the expense, the estimated dollar cost, and the reason the expense is necessary to the representation. An application seeking such an approval may be filed in camera, if necessary. Recurring expenses such as telephone toll calls and photocopying which aggregate more

DATE	DOCKET NUMBER	PROCEEDINGS
		than $150.00 on one or more interim vouchers are not considered single expense requiring Court approval; (signed by Chief Judge Michael B. Mukasey); (djc) (Entered: 08/05/2003)
09/30/2003		Terminated documents 6-1, 8-1 pursuant to instructions of Chief Judge Mukasey as indicated on the CJRA report. (rag) (Entered: 10/14/2003)

UNITED STATES CIRCUIT COURT OF APPEALS

03-2235

JOSE PADILLA, DONNA R. FREEMAN, AS NEXT FRIEND OF JOSE PADILLA, PETITIONER-APPELLEE-CROSS-APPELLANT

v.

DONALD H. RUMSFELD, RESPONDENT-APPELLANT-CROSS-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
4/21/03	Copy of notice of appeal and district court docket entries on behalf of Appellant USA, Appellant George W. Bush, Appellant Donald H. Rumsfeld, Appellant M. A. Marr filed. (COANRQ fed - hc ;fee wai) [03-2235]
4/21/03	Appellant USA, Appellant George W. Bush, Appellant

DATE	PROCEEDINGS
	Donald H. Rumsfeld, Appellant M. A. Marr motion to expedite appeal, to allow interlocutory appeal FILED (w/pfs). [2318802-2]
4/28/03	Letter dated 4/28/03 received from attorney Donna Newman stating that attorney Andrew Patel and her were appointed CJA attorney by the district court.
4/28/03	Appellee Jose Padilla motion to allow interlocutory appeal, to expedite appeal FILED (w/pfs). [2323376-2]
5/16/03	Record on appeal filed. (Original papers of district court.)
5/19/03	Letter sent to Appellee Jose Padilla, Appellant USA, Appellant George W. Bush, Appellant Donald H. Rumsfeld, Appellant M. A. Marr: informing parties that the record on appeal has been filed with this Court.
5/20/03	Record on appeal received in records room from team. (1 volume).
6/10/03	EXPEDITED case flag set.

DATE	PROCEEDINGS
6/10/03	Prisoner scheduling order #1 filed.
	Petitioners briefs and appendix due on 7/22/03, Respondents briefs due on 8/12/03. Reply briefs by both sides shall be filed by no later than September 1, 2003. Argument as early as week of 10/13/03. (SEE MOTION ORDER FILED 6/10/03)
6/11/03	Notice to counsel of order filed 6/10/3
6/11/03	Certified copy of the order of 6/10/03 issued to the district court.
6/11/03	Appellant petitions, pursuant to 28 U.S.C. &1219(b), for leave to appeal the district court orders dated December 4, 2002, and March 11, 2003 and to expedite the interlocutory appeal if permitted. Appellee-cross-appellant petitions, pursuant to &1292(b), for leave to appeal the portion of the district court order finding that the President had the authority to order the military to seize and detain Padilla as

DATE	PROCEEDINGS
	an unlawful combatant and that the Government need only present "some evidence" in support of its decision. Upon due consideration, it is ORDERED that the petitions are granted. Both parties have demonstrated that the district court orders involved controlling questions of law as to which there are substantial grounds for difference of opinion and that "an immediate appeal from the [district court] order may materially advance the ultimate termination of the litigation." See U.S.C. & 1292(b). It is further ORDERED that the motion to expedite the appeal is granted. Opening briefs by both sides shall be filed no later that July 22, 2003. Response briefs by both shall be filed by no later that August 12, 2003. Reply briefs by both sides shall be filed by no later than September 1, 2003. Counsel are hereby advised that oral argument in this matter will be heard on a date set by the Court no earlier than the week of October 13, 2003. (Before: RJM, JAC, Droney) (By:AH)

DATE	PROCEEDINGS
6/25/03	Certified copy of receipt returned from the district court.
	* * * * *
7/22/03	Appellant USA, Appellant George W. Bush, Appellant Donald H. Rumsfeld, Appellant M. A. Marr appendix filed w/pfs. .
7/22/03	Appellant USA, Appellant George W. Bush, Appellant Donald H. Rumsfeld, Appellant M. A. Marr brief FILED with proof of service. (shelves 60 & 65))
7/23/03	The CAPTION PAGE for this appeal has been AMENDED.
	* * * * *
7/23/03	Appellee Jose Padilla in 03-2235 brief RECEIVED.
	* * * * *
7/23/03	Appellee Jose Padilla in 03-2235 motion for leave to file oversized brief FILED (w/pfs). [2389486-1]
7/24/03	The CAPTION PAGE for this appeal has been AMENDED.
	* * * * *

DATE	PROCEEDINGS
7/28/03	Order FILED GRANTING motion for leave to file oversized brief [2389486-1] by Appellee Jose Padilla, endorsed on motion form dated 7/23/03. (AH)
	* * * * *
7/30/03	Appellee-Cross-Appellant Jose Padilla in 03-2235 brief filed with proof of service.
7/30/03	Amicus Curiae American Bar Associa in 03-2235 brief filed with proof of service.
	* * * * *
7/31/03	Notice of appearance form on behalf of David W. Debruin in 03-2235, Esq., received. (Orig. to Calendar)
	* * * * *
7/31/03	Amicus Curiae American Civil in 03-2235, Amicus Curiae New York Civil Liber in 03-2235 brief filed with proof of service.
7/31/03	Amicus Curiae Experts on the Law in 03-2235 brief filed with proof of service.
	* * * * *

DATE	PROCEEDINGS
7/31/03	Amicus Curiae Professors of Law in 03-2235 brief filed with proof of service.
	* * * * *
8/4/03	Amicus Curiae Center for Constitut in 03-2235 brief filed with proof of service.
8/4/03	Amicus Curiae The Cato in 03-2235 brief filed with proof of service.
	* * * * *
8/4/03	Order FILED GRANTING motion to file brief as amicus curiae [2391412-1] by Amicus Curiae Center for Constitut, endorsed on motion form dated 7/25/03., GRANTING motion for leave to file oversized brief [2391412-2] by Amicus Curiae Center for Constitut, endorsed on motion form dated 7/25/03. (Before: RCW)(By:LBP)
	* * * * *
8/12/03	Appellee-Cross-Appellant Jose Padilla in 03-2235 brief filed with proof of service.

DATE	PROCEEDINGS
8/12/03	Appellant-Cross-Appellee USA in 03-2235, Appellant-Cross-Appellee George W. Bush in 03-2235, Appellant-Cross-Appellee Donald H. Rumsfeld in 03-2235, Appellant-Cross-Appellee M. A. Marr in 03-2235 brief FILED with proof of service.
	* * * * *
8/19/03	Movant Public Defender Service in 03-2235 motion to file brief as amicus curiae FILED (w/pfs). [2408944-1]
	* * * * *
8/20/03	Amicus Curiae Sparticist League in 03-2235 brief filed with proof of service.
8/20/03	Amicus Curiae Association for the in 03-2235 brief filed with proof of service.
8/20/03	Amicus Curiae John J. Gibbons, et al, in 03-2235, Amicus brief filed with proof of service.
	* * * * *
8/21/03	Amicus Curiae Public Defender Service in 03-2235 brief filed with proof of service.
	* * * * *

DATE	PROCEEDINGS
8/21/03	Amicus Curiae Washington Legal in 03-2235, Amicus Curiae Allied Educational in 03-2235, Amicus Curiae Walter Jones in 03-2235, Amicus Curiae Lamar Smith in 03-2235, Amicus Curiae John Sweeney in 03-2235 brief filed with proof of service.
	* * * * *
8/22/03	Amicus Curiae NACDL in 03-2235, Amicus Curiae NYSACDL in 03-2235 brief filed with proof of service.
	* * * * *
8/26/03	Proposed for argument the week of 11/3/03.
	* * * * *
9/2/03	Appellee-Cross-Appellant Jose Padilla in 03-2235 reply brief received. Problem: motion to file oversized brief pending.

DATE	PROCEEDINGS
9/2/03	Appellant-Cross-Appellee USA in 03-2235, Appellant-Cross-Appellee George W. Bush in 03-2235, Appellant-Cross-Appellee Donald H. Rumsfeld in 03-2235, Appellant-Cross-Appellee M. A. Marr in 03-2235 reply brief filed with proof of service.
9/2/03	Appellee-Cross-Appellant Jose Padilla in 03-2235 motion for leave to file oversized brief FILED (w/pfs). [2419581-1]
9/3/03	* * * ORIGINAL * * * Argument as early as week of 10/13/03.
9/3/03	Appellee-Cross-Appellant Jose Padilla in 03-2235 reply brief filed with proof of service.
9/4/03	Notice to counsel of order filed 9/4/3.
9/4/03	Order FILED GRANTING motion for leave to file oversized brief [2419581-1] by Appellee-Cross-Ap Jose Padilla, endorsed on motion form dated 9/2/03. (AH)
9/9/03	Proposed for argument the week of 11/17/03 A Panel.
9/10/03	Notice to counsel of order filed 9/10/3.

DATE	PROCEEDINGS
9/10/03	Amicus Curiae New York Council in 03-2235 brief filed with proof of service.
	* * * * *
	* * * * *
9/25/03	Appellee-Cross-Appellant Jose Padilla in 03-2235 28(J) letter FILED.
	* * * * *
10/8/03	B PANEL/Set for argument on 11/17/03. [03-2235]
	* * * * *
	* * * * *
10/20/03	03-2235, Amicus Curiae H. Lee Sarokin in 03-2235, Amicus Curiae Harold R. Tyler in 03-2235, Amicus Curiae Donald Francis Donovan in 03-2235, Amicus Curiae Scott Greathead 03-2235, Amicus Curiae Robert E. Juceam in 03-2235, Amicus Curiae Philip Allen Lacovara in 03-2235, Amicus Curiae Robert Todd Lang in 03-2235, Amicus Curiae Robert M. Pennoyer in 03-2235, Amicus Curiae Barbara Paul Robinson min 03-2235, Amicus Curiae William D. Zabel

DATE	PROCEEDINGS
	in 03-2235, Amicus Curiae American Civil in 03-2235, Amicus Curiae New York Civil Liber in 03-2235, Amicus Curiae Experts on the Law in 03-2235, Amicus Curiae NACDL in 03-2235, Amicus Curiae NYSACDL in 03-2235, Amicus Curiae Public Defender Ser in 03-2235, oral argument FILED (w/pfs). [2457949-1]
10/20/03	Amicus Curiae The Cato in 03-2235, Amicus Curiae Center for Constitut in 03-2235, Amicus Curiae John J. Gibbons in 03-2235, Amicus Curiae Nathaniel R. Jones in 03-2235, Curiae Abner Mikva in 03-2235, Amicus Curiae William A. Norris in
10/24/03	Notice to counsel/Parties re: order.
10/24/03	Order FILED GRANTING motion to allow oral argument Padilla 25 minutes, Rumsfeld 40 minutes and Gibbons 15 minutes. [2457949-1] by Appellant-Cross-AUSA, George W. Bush, Donald H. Rumsfeld, M. A. Marr, Amicus

DATE	PROCEEDINGS
	Curiae The Cato, Professors of Law, Center for Constitut, Sparticist League, Partisan Defense Co, Association for the, American Bar Associa, John J. Gibbons, Nathaniel R. Jones, Abner J. Mikva, William A. Norris, H. Lee Sarokin, Harold R. Tyler, Donald Francis Donovan, Scott Greathead, Robert E. Juceam, Philip Allen Lacovara, Robert Todd Lang, Robert M. Pennoyer, Barbara Paul Robinson, William D. Zabel, American Civil, New York Civil Liber, Experts on the Law, Appellee-Cross-ApJose Padilla, Amicus Curiae NACDL, NYSACDL, Public Defender Ser, Washington Legal, Allied Educational, Walter Jones, Lamar Smith, John Sweeney, New York Council, endorsed on motion form dated 10/20/03.
10/30/03	Order filed stating " The Court directs the Attorneys for the respondent, Secretary of Defense Donald Rumsfeld, to produce copies of the sealed declarations of Special Advisor to the Under

DATE	PROCEEDINGS
	Secretary of Defense for Policy Michael II Mobbs and Vice Admiral Lowell E. Jacoby for the Court's reveiw on or before November 10, 2003. (FG)
11/1/03	Letter received from AUSA Eric Bruce, in response to this Court's order of 10/30/03.
11/5/03	REVISED Set for argument on 11/17/03, Ceremonial Courtroom, 500 Pearl St., 9th Floor. (10am) [03-2235, 03-2438]
11/7/03	Order filed stating: The parties are directed to divide its forty-minutes argument time as follows: see original order for additional information, FOR THE COURT (CA)
11/7/03	Notice to counsel order dated 11/7/03.
11/7/03	Order filed stating "The request made in the letter dated November 3, 2003 not to review the sealed declarations of Michael H. Mobbs and Vice Admiral Lowell E. Jacoby unless counsel for Padilla are also allowed access to these declarations is hereby DENIED".

DATE	PROCEEDINGS
11/7/03	Letter dated 11/3/03 received from attorney Newman which requests the Court not review sealed declarations of Michael Mobbs and Vice Admiral Lowell E. Jacoby.
11/10/03	Notice to counsel/parties re: order,
11/12/03	Letter dated 11/12/03 received from attorney Donna Newman advising court of how petitioner will proceed at oral argument, in light of this Court's order of 10/23/03.
11/13/03	Order filed in response to Attorney Donna Newman's Faxed letter of 11/12/03 (SEE copy of order for complete text) (By: RBM)
11/17/03	Case heard before POOLER, B.D. PARKER, WESLEY, C.JJ. (TAPE: Transcript available)
11/19/03	Letter received from attorney Donna Newman asking for videotape of argument.

DATE	PROCEEDINGS
11/20/03	Order filed stating " . . . The parties are further directed to furnish three copies of all legislative history so identified to the Clerk of the Court for distribution to the panel on or before November 28, 2003 . . ." (SEE COPY .OF ORDER FOR COMPLETE TEXT) (By:RBM) (Before: RSP, BDP, RCW)
11/21/03	Letter received from Aaron Orcutt requesting an oral argument tape. Fee Paid. Forward to Calendar. Receipt # 170773.
11/21/03	Letter received from Hilary Ley requesting an oral argument tape. Fee pd. Forwarded to calender. 170786.
11/26/03	Copy of approved request for transcripts of argument, received.
12/1/03	Papers responding to this Court's order of November 20, 2003 received from Appellant-Cross-Appellee USA in 03-2235, Appellant-Cross-Appellee George W. Bush in Appellant-Cross-Appellee Donald H. Rumsfeld in

DATE	PROCEEDINGS
	03-2235, Appellant-Cross-Appellee M. A. Marr in 03-2235, Appellant-Cross-Appellee USA in 03-2438 received. (Submitted by Deputy Solicitor General Paul D. Clement).
12/3/03	Papers (in response to this Court order of 11/20/03) from Appellant-Cross-Appellee USA in 03-2235, Appellant-Cross-Appellee George W. Bush in Appellant-Cross-Appellee Donald H. Rumsfeld in 03-2235, Appellant-Cross-Appellee M. A. Marr in 03-2235, Appellee-Cross-Appellant Jose Padilla in 03-2235 received.
12/18/03	Judgment of the district court is AFFIRMED in part, REVERSED & REMANDED in part by published signed opinion filed. (RSP, BDP) [03-2235]
12/18/03	Judge Wesley DISSENTING in a separate opinion filed.
12/18/03	Judgment filed. [Entry Date: 12/18/03]
1/9/04	Transcript of of argument of 11/17/03, filed.
1/14/04	Errata sheet re: filed.

DATE	PROCEEDINGS
1/16/04	Appellant-Cross-Appellee M. Marr, Appellant-Cross-Appellee Donald Rumsfeld, Appellant-Cross-Appellee George Bush, et al motion for stay of mandate filed with proof of service.
1/20/04	Appellee-cross-Appellant Jose Padilla opposition to motion for stay filed with proof of service.
1/22/04	Order FILED GRANTING motion for stay by Appellant-Cross-Appellee M. Marr, Appellant-Cross-Appellee United States of America, Appellant-Cross-Appellee George Bush, Appellant-Cross-Appellee Donald Rumsfeld, endorsed on motion dated 1/16/2004
1/22/04	Notice to counsel in re: of order filed 1/22/04
1/23/04	Papers (copy of affidavit in support of motion for stay of mandate, [motion filed 1/16/04]) from APPELLANT-CROSS-APPELLEE United States of America, Donald Rumsfeld, George Bush, M. Marr, received.

DATE	PROCEEDINGS
1/29/04	Notice of filing petition for APPELLANT-CROSS-APPELLEE United States of America, Donald Rumsfeld, George Bush, M. Marr, dated

Docket as of March 04, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE PADILLA, DONNA R. NEWMAN, AS NEXT FRIEND OF JOSE PADILLA, PETITIONERS

v.

GEORGE W. BUSH, EX OFFICIO COMMANDER-IN-CHIEF OF US ARMED FORCES; DONALD RUMSFELD, SECRETARY OF DEFENSE; JOHN ASHCROFT, ATTORNEY GENERAL; COMMANDER M. A. MARR, CONSOLIDATED NAVAL BRIG., RESPONDENTS

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

1. Jose Padilla, a citizen of the United States of America, is being held illegally, denied access to legal counsel, and denied access to any Court for the determination of the legality of his detention in violation of his rights under the Constitution of the United States of America. Donna R. Newman, Esq., on behalf of Mr. Padilla as his Next Friend, respectfully requests that this Court issue a Writ of Habeas Corpus.

2. A Petition for Writ of Habeas Corpus was previously filed with this Court. This amended Petition is submitted pursuant to 28 U.S.C. § 2242 and Rule 15 of the Federal Rules of Civil Procedure.

PARTIES

3. Petitioner Jose Padilla is an American Citizen presently incarcerated and unlawfully held by Respondents at the Consolidated Naval Brig in Charleston, South Carolina.

4. Petitioner Donna R. Newman is an attorney duly admitted to practice law in the Southern District of New York. On or about May 15, 2002, Petitioner Donna R. Newman was assigned to represent Petitioner Jose Padilla by Order of the Honorable Chief Judge Michael B. Mukasey.

5. Petitioner Donna R. Newman, seeks relief as "Next Friend" pursuant to the requirements of *Whitmore v. Arkansas*, 495 U.S. 149 (1990) which requires a "next friend" to provide an adequate explanation why the real party in action cannot appear on his own behalf, to be truly dedicated to the best interests of the person on whose behalf she seeks to litigate and for the "next friend" to demonstrate some significant relationship with the real party in interest.

6. In the instant matter, Petitioner Jose Padilla cannot appear because he is detained in the Consolidated Naval Brig in Charleston, South Carolina. Petitioner Jose Padilla cannot sign and verify the Amended Petition as counsel has been denied access to him by the Respondents. Petitioner Jose Padilla is not permitted to send or receive mail. Respondents have not permitted Petitioner Jose Padilla to communicate with anyone else including members of his family. Thus Petitioner is without means or access to file a Petition on his own behalf.

7. Petitioner Donna R. Newman, as counsel to Jose Padilla has a significant relationship with the Petitioner Jose Padilla. After being assigned to represent, Jose Padilla on or about May 15, 2002, Petitioner Donna R. Newman filed and argued motions on his behalf and met with Mr. Padilla at the M.C.C. repeatedly and regularly as his attorney. Before Mr. Padilla was signed over to his current place of detention, Petitioner Donna R. Newman had established a attorney-client relationship with Jose Padilla. She has a professional obligation under the Code of Professional Ethics to zealously represent the best interests of her client. Attorneys have been permitted to act as "next friend." *See Nash v. MacArthur*, 184 F.2d 606 (D.C. Cir. 1950).

8. Respondent Bush is the President of the United States and Commander-in-Chief of the Armed Forces of the United States.

9. Respondent Rumsfeld is the United States Secretary of Defense and Respondent Marr's superior. He determines the conditions under which Petitioner Jose Padilla is held.

10. Respondent M.A. Marr is a Commander in the United States Navy and is in command of the Consolidated Naval Brig in Charleston, South Carolina. Respondent M.A. Marr receives orders with regard to Petitioner's custody from her superiors, including Respondents Bush and Rumsfeld. That Commander Marr could not obey an Order of this Court to release Petitioner Padilla without violating the order of a superior officer and thereby violating the Uniform Code of Military Justice. See 10 U.S.C. § 892.

11. Respondent Ashcroft is the Attorney General of the United States and is the superior to the Agents of the Federal Bureau of Investigation who initially seized Mr. Padilla and who on information and belief continue to interrogate Mr. Padilla in violation of his constitutional rights. Respondent Ashcroft is also the superior to the United States Attorney's Office for the Southern District of New York who, who on information and belief, assisted the Department of Defense in the seizure of Jose Padilla.

JURISDICTION

12. Petitioners bring this action under 28 U.S.C. §§ 2241 and 2442, and invoke this Court's jurisdiction under 28 U.S.C. §§ 1331, 1651, 2201 and 2202; as well as the under the Fourth, Fifth and Sixth Amendments to the United States Constitution.

13. This Court is empowered under 28 U.S.C. §§ 2241 to grant a Writ of Habeas Corpus and to entertain the Petition filed by Donna R. Newman, as Next Friend under 28 U.S.C. §§ 2242.

VENUE

14. Venue is proper in the United States District Court for the Southern District of New York ("United States Attorney's Office") because this Court has unique familiarity with the facts and circumstances of this case and the resolution of the case does not require Padilla's presence. *See, Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 493-94, 35 L. Ed. 2d 433, 93 S. Ct. 1123 (1973) (Traditional venue con-

siderations apply to habeas cases; those include (1) where the material events occurred; (2) where records and witnesses pertinent to the claim are likely to be found; (3) the convenience of the forum for respondent and petitioner; and (4) the familiarity of the court with the applicable laws).

STATEMENT OF FACTS

15. On May 8, 2002, Jose Padilla, an American citizen, was arrested by agents of the Federal Bureau of Investigation ["FBI"] at O'Hare Airport in Chicago, Illinois, upon a material witness warrant signed by the Honorable Michael B. Mukasey, Chief Judge of the United States District Court for the Southern District of New York.

16. The Court Order on which Mr. Padilla was arrested had been applied for by the United States Attorney's Office for the Southern District of New York.

17. On information and belief, Petitioner Jose Padilla was transported by agents of the FBI from Chicago to New York.

18. On or about May 15, 2002, Petitioner Jose Padilla appeared before the Honorable Michael B. Mukasey, who assigned Petitioner Donna R. Newman to represent Mr. Padilla pursuant to the Criminal Justice Act. 18 U.S.C. § 3006A.

19. Petitioner Donna R. Newman met repeatedly and regularly with Mr. Padilla when he was being housed in the Metropolitan Correctional Center in New York, a prison operated by Department of Justice, Bureau of Prisons.

20. As an additional part of her representation of Mr. Padilla, Petitioner Donna R. Newman also appeared in court, filed and argued motions, and on his behalf consulted with both members of Mr. Padilla's family and representatives of the Government. She continued to consult with the Government and Mr. Padilla's family in her role as his attorney.

21. The motions filed sought Mr. Padilla's release, asserting his detention was illegal and contrary to his constitutional rights. The United States Attorney's Office for the Southern District of New York filed extensive papers in opposition to Padilla's motions. Judge Mukasey received all submissions and scheduled a hearing on Padilla's motion for June 11, 2002.

22. On information and belief, on or about June 9, 2002, after consulting with the Respondent Ashcroft and a representative of Respondent Rumsfeld, George W. Bush, the President of the United States, acting as Commander-in-Chief, signed an order declaring Jose Padilla to be a "enemy combatant" and directing Respondent Rumsfeld to arrest Mr. Padilla and to detain him indefinitely for interrogation. *See Exhibit A*, transcript of Respondent Ashcroft's June 10, 2002 statement.

23. Despite requests to several government officials, the Government has refused to provide counsel for Respondent Padilla with a copy of the Order the President is reported to have signed. *See Exhibit B*, letters from Donna R. Newman requesting a copy of the Order on which Mr. Padilla was detained by military authorities.

24. On information and belief the term "enemy combatant" is not defined in either the United States Code or in the Uniformed Code of Military Justice.

25. On or about June 9, 2002, Petitioner Jose Padilla was transferred from the custody of the civilian authorities of the Department of Justice to the military authorities at the Consolidated Naval Brig at Charleston, South Carolina.

26. On information and belief, the Consolidated Naval Brig at Charleston, South Carolina is located on a United States Naval base where access is restricted to members of the military and other specifically designated individuals.

27. In the year 2002, the United States District Court for the Southern District of New York has been "opened for business" without interruption.

28. Petitioner Donna R. Newman was informed by representatives of the Department of Defense that she could not visit or speak with Jose Padilla.

29. On information and belief, from May 2002 through the time this Petition was filed a grand jury has been sitting in the Southern District of New York. No member of the United States Attorney's Office for the Southern District of New York has advised Petitioner Donna R. Newman that an indictment has been returned that charges Jose Padilla with any criminal conduct. Nor, on information and belief, has any complaint been filed in the United States District Court for the Southern District of New York that charges Jose Padilla with any criminal conduct.

30. As of the date of this Petition, Mr. Padilla has not been charged with any offense. Nor, according to press reports, are any criminal charges contemplated.

31. Respondent Rumsfeld has stated publicly that it is the Government's intention to detain Mr. Padilla indefinitely to interrogate him.

CLAIMS AS TO THE UNLAWFULNESS OF PETITIONER'S DETENTION

FIRST CLAIM FOR RELIEF
(DUE PROCESS - FOURTH , FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION)

32. Petitioner incorporate paragraphs 1-28 by reference.

33. It is a violation of the Due Process Clause of the Fifth Amendment to the United States Constitution to hold an American citizen without giving notice of the basis for his detention.

34. By the action described above, Respondents, acting under color of law, have violated and continue to violate the Fourth, Fifth and Sixth Amendments to the United States Constitution. *See e.g., Zadvyadas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the [Due Process] Clause protects . . . And this Court has said that government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate

constitutional protections . . .") Also see *Ex Parte Milligan*, 71 U.S. 2, 123 (1866) ("[C]itizens of states where the courts are open, if charged with a crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on pleas of state or political necessity.")

35. There is no authority to detain an American citizen without a finding of probable cause. *See, e.g., United States Ex Rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955) an "assertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or any theory of martial law."

SECOND CLAIM FOR RELIEF
(SUSPENSION OF THE WRIT)

36. Petitioner incorporate paragraphs 1-28 by reference.

37. To the extent the Presidential Order on which Mr. Padilla is held as an "enemy combatant" disallows any challenge to the legality of Mr. Padilla's detention by way of habeas corpus, the Order and its enforcement constitutes an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution.

THIRD CLAIM FOR RELIEF
(VIOLATION OF POSSE COMITATUS)

38. Petitioner incorporate paragraphs 1-28 reference.

39. The Posse Comitatus Act, 18 U.S.C. § 1385 prohibits Army and Air Force personnel from participating in civilian law enforcement activities. Members of the Army, Navy, Air Force and Marine Corps are prohibited from participating in civilian law enforcement activities by 10 U.S.C. § 375 and as a matter of Department of Defense policy, see Department of Defense Directive 5525.5(C).

40. As the Courts of the United States are opened and no state of martial law exists, it is unlawful for an Jose Padilla, an American citizen to be held by the military at the Consolidated Naval Brig in Charleston, South Carolina.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for the relief as follows:

1. Grant Petitioner Donna R. Newman, Next Friend status, as Next Friend of Jose Padilla;
2. Order Respondents to permit counsel to meet and confer with Jose Padilla;
3. Order Respondents to permit Jose Padilla to receive a copy of this Petition;
4. Order Respondents to cease all interrogations of Mr. Padilla, direct of indirect, while this litigation is pending;
5. Order and declare that Mr. Padilla is being held in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution.
6. To the extent Respondents contest any material factual allegation in this Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations;
7. Order that Petitioner Jose Padilla be released from Respondents' unlawful custody;
8. In the event that it is determined that venue does not properly lie in the Southern District Court of New York, that this matter be transferred to the appropriate United States District Court.
9. Such other relief as the Court may deem necessary and appropriate.

Dated: June 19, 2002

Respectfully submitted,

Jose Padilla and Donna R. Newman,
as Next Friend

By: DONNA R. NEWMAN
DONNA R. NEWMAN, Esq. [6299]
121 West 27th Street, Suite 1103
New York, New York 10001
212-229-1516

ANDREW G. PATEL
ANDREW G. PATEL, Esq. [4361]
111 Broadway, 13th Floor
New York, New York 10006
212-349-0230

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK)
SOUTHERN DISTRICT OF NEW YORK) ss:

DONNA R. NEWMAN being duly sworn depose and say:

1. I am Donna R. Newman, Next Friend for Petitioner Jose Padilla, state under pain and penalty of perjury that to the best of my knowledge and belief, the facts set forth in this Petition are true and correct.

Dated: New York, New York
June 19, 2002

DONNA R. NEWMAN
DONNA R. NEWMAN, Esq. [6299]

Sworn to before me this
19th day of June 2002

/s/
NOTARY PUBLIC

Andrew Patel
Notary Public, State of New York
No. 4829-468
Qualified in Westchester County
Commission Expires August 31, 2005

EXHIBIT A

Transcript of the Attorney General John Ashcroft Regarding the transfer of Abdullah Al Muhajir (Born Jose Padilla) To the Department of Defense as an Enemy Combatant
06/10/02

I am pleased to announce today a significant step forward in the War on Terrorism. We have captured a known terrorist who was exploring a plan to build and explode a radiological dispersion devise, or "dirty bomb," in the United States. I commend the FBI, the CIA, the Defense Department, and the other federal agencies whose cooperation made this possible.

Yesterday, after consultation with the Acting Secretary of Defense and other senior officials, both the Acting Secretary of Defense and I recommended that the President of the United States, in his capacity as commander in chief, determine that Abdullah Al Muhajir, born Jose Padilla, is an enemy combatant who poses a serious and continuing threat to the American people and our national security.

After the determination, Abdullah Al Muhajir was transferred from the custody of the Justice Department to the custody of the Defense Department.

Following serving in prison in the United States in the early 1990s, Jose Padilla referred to himself as Abdullah Al Muhajir. Subsequent to his release from prison, he traveled to Afghanistan and Pakistan. On several occasions in 2001, he met with senior Al Qaeda officials.

While in Afghanistan and Pakistan, Al Muhajir trained with the enemy, including studying how to wire explosive devises and researching radiological dis-

persion devices. Al Qaeda officials knew that as a citizen of the United States, as a citizen of the United States holding a valid U.S. passport, Al Muhajir would be able to travel freely in the U.S. without drawing attention to himself.

The United States government was tracking Abdullah Al Muhajir when, on May the 8th, 2002, this year, he flew from Pakistan into Chicago O'Hare International Airport, where he was placed in the custody of federal law enforcement authorities.

In apprehending Al Muhajir as he sought entry into the United States, we have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive "dirty bomb."

Now, a radioactive "dirty bomb" involves exploding a conventional bomb that not only kills victims in the immediate vicinity, but also spreads radioactive material that is highly toxic to humans and can cause mass death and injury.

From information available to the United States government, we know that Abdullah Al Muhajir is an Al Qaeda operative and was exploring a plan to build and explode a radioactive "dirty bomb."

Let me be clear: We know from multiple independent and corroborating sources that Abdullah Al Muhajir was closely associated with Al Qaeda and that as an Al Qaeda operative he was involved in planning future terrorist attacks on innocent American civilians in the United States.

The safety of all Americans and the national security interest of the United States require that Abdullah Al Muhajir be detained by the Defense Department as an enemy combatant. In determining that Al Muhajir is an

enemy combatant who legally can be detained by the United States military, we have acted with legal authority both under the laws of war and clear Supreme Court precedent, which establish that the military may detain a United States citizen who has joined the enemy and has entered our country to carry out hostile acts.

Once again, I commend the FBI, the CIA and other agencies involved in capturing Abdullah Al Muhajir before he could act on his deadly plan.

Because of the close cooperation among the FBI, the CIA, Defense Department and other federal agencies, we were able to thwart this terrorist.

To our enemies, I say we will continue to be vigilant against all threats, whether they come from overseas or at home in America. To our citizens, I say we will continue to respect the rule of law while doing everything in our power to prevent terrorist attacks.

EXHIBIT B

DONNA R. NEWMAN

ATTORNEY AT LAW

121 West 27th Street
SUITE 1103
NEW YORK, NY 1001
TEL; (212) 229-1516
FAX: (212) 924-0726
E-MAIL:
donnanewmanlaw@aol.com

8 LOTT STREET
JERSEY CITY, NJ
07306
TEL: (201) 420-5951
FAX: (201) 420-8977

REPLY TO _____

June 17, 2002

Via facsimile to (202) 456-2461
and first class mail
Alberto Gonzalez
Counsel to the President
Executive Office of the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Jose Padilla

Dear Mr. Gonzalez:

I represent Mr. Padilla. I was informed last Monday morning, June 10, 2002, that President George W. Bush signed an Order directing the Department of Defense to take custody of my client from the Department of Justice and detain him at a naval military prison. Demand is hereby made for a copy of that Directive and/or Order. A copy of the document should immediately be sent to me via e-mail *donnanewmanlaw@aol.com)*, facsimile, and first class mail.

I thank you for your immediate attention to this request.

Very truly yours,

/s/ DONNA R. NEWMAN
DONNA R. NEWMAN
DRN/ad

DONNA R. NEWMAN
ATTORNEY AT LAW

121 West 27th Street
SUITE 1103
NEW YORK, NY 1001
TEL; (212) 229-1516
FAX: (212) 924-0726
E-MAIL:
donnanewmanlaw@aol.com

8 LOTT STREET
JERSEY CITY, NJ
07306
TEL: (201) 420-5951
FAX: (201) 420-8977

REPLY TO _____

June 17, 2002

Via facsimile to (703) 693-7278
and first class mail
Hon. William J. Haynes II
General Counsel of the Department of Defense
1600 Defense Pentagon, Room 3E980
Washington, DC 20301-1600

Re: Jose Padilla

Dear Mr. Haynes:

I represent Mr. Padilla. I was informed last Monday morning, June 10, 2002, that President George W. Bush had signed an Order on Sunday evening, June 9, 2002, directing the Department of Defense to take custody of my client from the Department of Justice and detain him at a naval military prison. Demand is hereby made for a copy of that Directive and/or Order. A copy of the document should immediately be sent to me via e-mail (*donnanewmanlaw@aol.com*), facsimile, and first class mail.

I understand from the media that my client is being held in Charleston, South Carolina in the military brig. I have spoken with a member of your staff who advised that I would not be permitted to consult with my client

in person, by telephone, or by mail. I request official verification of the Department of Defense policy with respect to my contact with Mr. Padilla.

I thank you for your immediate attention to this request.

Very truly yours,

/s/ DONNA R. NEWMAN
DONNA R. NEWMAN
DRN/ad

DONNA R. NEWMAN
ATTORNEY AT LAW

121 West 27th Street
SUITE 1103
NEW YORK, NY 1001
TEL; (212) 229-1516
FAX: (212) 924-0726
E-MAIL:
donnanewmanlaw@aol.com

8 LOTT STREET
JERSEY CITY, NJ
07306
TEL: (201) 420-5951
FAX: (201) 420-8977

REPLY TO _____

June 17, 2002

Via Fax 718-422-1701 and first class mail
AUSA Eric B. Bruce, Esq.
United States Attorney's Office
Southern District of New York
One Saint Andrew's Plaza
New York, New York 10007

Re: Jose Padilla

Dear Mr. Bruce:

Demand is hereby made for a copy of the Directive/Order signed by President George W. Bush on June 9, 2002 ordering the Department of Defense to take custody of Mr. Padilla and transfer him to a military prison. Kindly send me a copy of this document via e-mail, facsimile, and first class mail immediately.

Very truly yours,

/s/ DONNA R. NEWMAN
DONNA R. NEWMAN
DRN/ad

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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02 Civ. 4445 (MBM)

JOSE PADILLA, DONNA R. NEWMAN, AS NEXT FRIEND OF JOSE PADILLA, PETITIONERS

v.

GEORGE W. BUSH, DONALD RUMSFELD, JOHN ASHCROFT, COMMANDER M. A. MARR, RESPONDENTS

AFFIDAVIT OF DONNA R. NEWMAN

DONNA R. NEWMAN being duly sworn, deposes and says:

1. I am the attorney of record for Jose Padilla having been assigned to represent him pursuant to the Criminal Justice Act on May 15, 2002. The information contained in this affidavit is based on information and belief, obtained through my review of my file, conversations with the government, law enforcement, and my clients family and friends and where indicated on personal knowledge.
2. Mr. Padilla traveled to Chicago to visit with his son.
3. After visiting his son, he planned to travel to Florida to visit other members of his family.

4. When Mr. Padilla arrived at the airport he was carrying a valid United States Passport. Mr. Padilla was not carrying weapons, explosives or bomb making instructions.

5. At the Chicago airport, he spoke with law enforcement agents for several hours. He politely answered their questions.

6. When Mr. Padilla was told that he was being arrested, he requested an attorney.

7. Mr. Padilla has never been to Washington, D.C. and he has no special knowledge of the Washington, D.C. area.

8. After Mr. Padilla was transferred to the Consolidated Naval Brig in Charleston, South Carolina, I spoke with a legal representative from the Department of Defense. I was informed that I could not visit Mr. Padilla, that his family could not visit him, and that he would not be able to call me or his family. I asked if I could write to Mr. Padilla and I was told that I would be permitted to write to Mr. Padilla. I asked the representative if what I sent to Mr. Padilla would actually be delivered to him. The representative of the Department of Defense to me that he could not give me assurance that anything that I sent to Mr. Padilla would actually be received by him.

Dated: New York, New York
September 24, 2002

Respectfully submitted,

/s/ DONNA R. NEWMAN
DONNA R. NEWMAN

Sworn to before me this
24th day of September, 2002

/s/
NOTARY PUBLIC

Andrew Patel
Notary Public, State of New York
No. 4829-468
Qualified in Westchester County
Commission Expires August 31, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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02 Civ. 4445 (MBM)

JOSE PADILLA, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

[Filed: Sept. 26, 2002]

ORDER

Michael B. Mukasey, U.S.D.J.

On application by petitioner, and consent of respondent, the statement in the May 8, 2002, affidavit in support of the material witness warrant herein to the effect that petitioner indicated he was unwilling to become a martyr is unsealed.

SO ORDERED:

/s/ MICHAEL B. MUKASEY
MICHAEL B. MUKASEY,
U.S. District Judge

Dated: New York, New York
September 26, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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02 Civ. 4445 (MBM)

JOSE PADILLA, DONNA R. NEWMAN, AS NEXT FRIEND OF JOSE PADILLA, PETITIONERS

v.

GEORGE W. BUSH, DONALD RUMSFELD, COMMANDER M. A. MARR, RESPONDENTS

AFFIRMATION OF DONNA R. NEWMAN

DONNA R. NEWMAN, Esq. an attorney duly admitted to practice law before the bar of this Court and this State, affirms, under penalties of perjury, as follows:

1. I am the attorney of record for the Petitioner, Jose Padilla.

2. While Mr. Padilla was being held in the Metropolitan Correction Center, I met with him repeatedly.

3. During our meetings, I was able to and did have meaningful and substantive discussions with Mr. Padilla about various aspects of this matter.

WHEREFORE, it is respectfully submitted that this Court should issue the requested Writ of Habeas Corpus.

Dated: New York, New York
November 22, 2002

Respectfully submitted,

/s/ DONNA R. NEWMAN
DONNA R. NEWMAN, 6299
121 West 27th St., Suite 1103
New York, New York 10001

Declaration of Vice Admiral Lowell E. Jacoby (USN) Director of the Defense Intelligence Agency

Pursuant to 28 U.S.C. § 1746, I, Vice Admiral Lowell E. Jacoby, hereby declare that to the best of my knowledge, information, and belief, and under penalty of perjury, the following is true and correct:

Summary

I submit this Declaration for the Court's consideration in the matter of *Jose Padilla v. George W, Bush et al.*, Case No. 02 Civ. 4445, pending in the United States District Court for the Southern District of New York. This Declaration addresses the following topics:

- my qualifications as an intelligence officer and Director of the Defense Intelligence Agency;
- the roles and mission of the Defense Intelligence Agency;
- the intelligence process;
- interrogations as an intelligence tool;
- interrogation techniques;
- use of interrogations in the War on Terrorism;
- intelligence value of Jose Padilla; and
- potential impact of granting Padilla access to counsel.

Based upon information provided to me in the course of my official duties, I am familiar with each of the topics addressed in this Declaration. I am also familiar with the interrogations of Jose Padilla ("Padilla") conducted by agents of the Federal Bureau of Investigation ("FBI") after his detention in Chicago on 8 May 2002 and by agents of the Department of Defense ("DoD")

after DoD took control of Padilla on 9 June 2002. I have not included information obtained from any interrogations in this Declaration, however.

I assess Padilla's potential intelligence value as very high. I also firmly believe that providing Padilla access to counsel risks loss of a critical intelligence resource, resulting in a grave and direct threat to national security.

Experience

I am a Vice Admiral in the United States Navy, with more than 30 years of active federal commissioned service. I currently am the Director of the Defense Intelligence Agency. I report to the Secretary of Defense. In addition to other assignments, I have previously served as the Director of Intelligence (J2) for the Chairman of the Joint Chiefs of Staff; the Director of Intelligence for the Commander of the U.S. Pacific Command; the Commander of the Joint Intelligence Center Pacific; and the Commander of the Office of Naval Intelligence.

I have received the National Intelligence Medal of Achievement from the Director of Central Intelligence. My military decorations include two Defense Distinguished Service Medals, the Navy Distinguished Service Medal, the Defense Superior Service Medal, and two Legions of Merit. I hold a Masters degree in National Security Affairs from the Naval Postgraduate School.

The Defense Intelligence Agency

The Defense Intelligence Agency ("DIA") is a DoD combat support agency with over 7,000 military and civilian employees worldwide. DIA is a component of DoD and an important member of the United States Intelligence Community—a federation of 14 executive

branch agencies and organizations that work separately and cooperatively to conduct intelligence activities necessary to protect the national security of the United States.

DIA activities include collection of information needed by the President and Vice President, the National Security Council, the Secretaries of State and Defense, and other Executive Branch officials for the performance of their duties and responsibilities. One of DIA's highest priorities is to collect intelligence on terrorists, including al Qaida members, by interrogation and other means.

The Defense HUMINT Service ("DHS"), under DIA's Directorate for Operations, handles all human-source intelligence collection within DoD.

The Intelligence Process

The security of this Nation and its citizens is dependent upon the United States Government's ability to gather, analyze, and disseminate timely and effective intelligence. DIA has expended considerable efforts to develop effective intelligence techniques.

Generally speaking, the intelligence cycle can be broken down into five basic steps:

1. **Planning and direction.** Senior United States policy makers establish the intelligence requirements for DIA. DIA formulates more specific plans and directions to meet those requirements. Finished intelligence products also generate new requirements.

2. **Collection.** Raw intelligence data can be gathered by various means. Human-Source Intelligence ("HUMINT") is the oldest and historically

the primary method of collecting intelligence. HUMINT includes clandestine acquisition of materials as well as overt collection of information through methods such as interrogation.

3. **Processing and exploitation.** Intelligence data, including human-source reports, must be converted to a form and context to make them more comprehensible to the intelligence analysts and other users.

4. **Analysis and production.** Intelligence analysts absorb the incoming information, evaluate it, and prepare a variety of intelligence products.

5. **Dissemination.** After reviewing intelligence information and correlating it with other information available, analysts typically disseminate finished intelligence to various users.

One critical feature of the intelligence process is that it must be continuous. Any interruption to the intelligence gathering process, especially from an external source, risks mission failure. The timely, effective use of intelligence provides this Nation with the best chance of achieving success in combating terrorism at home and abroad, thus helping to prevent future catastrophic terrorist attacks.

Protecting the specific sources and methods used during the intelligence process is of paramount importance to the integrity of the process. DIA employs all available safeguards to ensure that its sources and methods are not intentionally or inadvertently made public or disclosed outside the Intelligence Community, because of the resulting damage to intelligence collection efforts.

Interrogation as an Intelligence Tool

Interrogation is a fundamental tool used in the gathering of intelligence. Interrogation is the art of questioning and examining a source to obtain the maximum amount of usable, reliable information in the least amount of time to meet intelligence requirements. Sources may include insurgents, enemy combatants, defectors, refugees, displaced persons, agents, suspected agents, or others.

Interrogations are vital in all combat operations, regardless of the intensity of conflict. Interrogation permits the collection of information from sources with direct knowledge of, among other things, plans, locations, and persons seeking to do harm to the United States and its citizens. When done effectively, interrogation provides information that likely could not be gained from any other source. Interrogations can provide information on almost any topic of intelligence interest.

The Department of the Army's Field Manual governing Intelligence Interrogation, FM 34-52, dated 28 September 1992, provides several examples of the importance of interrogations in gathering intelligence. The Manual cites, for example, the United States General Board on Intelligence survey of nearly 80 intelligence units after World War II. Based upon those surveys, the Board estimated that 43 percent of all intelligence produced in the European theater of operations was from HUMINT, and 84 percent of the HUMINT was from interrogation. The majority of those surveyed agreed that interrogation was the most valuable of all collection operations.

The Army Field Manual also notes that during OPERATION DESERT STORM, DoD interrogators collected information that, among other things, helped to:

- develop a plan to breach Iraqi defensive belts;
- confirm Iraqi supply-line interdiction by coalition air strikes;
- identify diminishing Iraqi troop morale; and
- identify a United States Prisoner of War captured during the battle of Kafji.

Interrogation Techniques

DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or, even years, after the interrogation process began.

Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process. Therefore, it is critical to minimize external influences

on the interrogation process. Indeed, foreign governments have used these techniques against captured DoD personnel.

Even the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949—which the President has determined does not apply to enemy combatants such as Padilla—recognizes that a detainee's ability to communicate with members of his or her family or government may be suspended when such a person is suspected of engaging in activities hostile to the security of the detaining State.

Use of Interrogations in the War on Terrorism

Terrorism poses an asymmetric threat to the United States. "Asymmetric warfare" generally consists of unanticipated or non-traditional approaches to circumvent or undermine an adversary's strengths while exploiting its vulnerabilities through unexpected technologies or innovative means. "Asymmetric warfare" may also consist of leveraging inferior tactical or operational strength against American vulnerabilities to achieve disproportionate effect with the aim of undermining American will in order to achieve the asymmetric actor's strategic objectives.

Unlike any previous conflict, we face a foe that knows no borders and perceives all Americans, wherever they may be, as targets of opportunity. Our terrorist enemies have also clearly demonstrated their willingness—and in fact have expressed their intent—to use any type of potential weapon, including weapons of mass destruction.

This asymmetric threat creates difficult and unique challenges for DIA because of the many variables in identifying and addressing the threat. The complexi-

ties of the problem—and the dire consequences at stake—require innovative and aggressive solutions.

As explained above, the intelligence cycle is continuous. This dynamic is especially important in the War on Terrorism. There is a constant need to ask detainees new lines of questions as additional detainees are taken into custody and new information is obtained from them and from other intelligence-gathering methods. Thus, it is vitally important to maintain an ongoing intelligence process, including interrogations.

The United States is now engaged in a robust program of interrogating individuals who have been identified as enemy combatants in the War on Terrorism. These enemy combatants hold critical information about our enemy and its planned attacks against the United States that is vital to our national security.

These interrogations have been conducted at many locations worldwide by personnel from DIA and other organizations in the Intelligence Community. The results of these interrogations have provided vital information to the President, military commanders, and others involved in the War on Terrorism. It is estimated that more than 100 additional attacks on the United States and its interests have been thwarted since 11 September 2001 by the effective intelligence gathering efforts of the Intelligence Community and others.

In fact, Padilla's capture and detention were the direct result of such effective intelligence gathering efforts. The information leading to Padilla's capture came from a variety of sources over time, including the interrogation of other detainees. Knowledge of and disruption of al Qaida's plot to detonate a "dirty bomb" or arrange

for other attacks within the United States may not have occurred absent the interrogation techniques described above.

Interrogating members of al Qaida, or those individuals trained by al Qaida, poses additional challenges and risks. Al Qaida is a highly dangerous and sophisticated terrorist organization that has studied and learned many counterintelligence techniques. An al Qaida training manual, "Military Studies in the Jihad Against the Tyrants," provides instructions regarding, among other things: the collection of intelligence; counter-interrogation techniques; and means of covert communication during periods of capture. As detainees collectively increase their knowledge about United States detention facilities and methods of interrogation, the potential risk to national security increases should those methods be released. Moreover, counsel or others given access to detainees could unwittingly provide information to the detainee, or be used by the detainee as a communication tool.

In summary, the War on Terrorism cannot be won without timely, reliable, and abundant intelligence. That intelligence cannot be obtained without robust interrogation efforts. Impairment of the interrogation tool—especially with respect to enemy combatants associated with al Qaida—would undermine our Nation's intelligence gathering efforts, thus jeopardizing the national security of the United States.

Intelligence Value of Jose Padilla

Padilla is currently being detained in the Naval Consolidated Brig, Charleston at Naval Weapons Station, Charleston, South Carolina. The President has determined that Padilla is closely associated with al Qaida, an

international terrorist organization with which the United States is at war. The President has further determined that Padilla possesses intelligence, including intelligence about personnel and activities of al Qaida, that, if communicated to the United States, would aid our efforts to prevent further attacks by al Qaida on the United States, its armed forces, other government personnel, or its citizens.

Padilla has been implicated in several plots to carry out attacks against the United States, including the possible use of a "dirty" radiological bomb in Washington DC or elsewhere, and the possible detonation of explosives in hotel rooms, gas stations, and train stations.

As noted in the unclassified Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, dated 27 August 2002, Padilla has, among other things:

- met with senior Usama Bin Laden lieutenant Abu Zabaydah in Afghanistan about conducting terrorist operations in the United States;
- conducted research in the construction of a "uranium-enhanced" explosive device at an al Qaida safehouse in Pakistan;
- discussed plans to build and detonate a "radiological dispersal device" (also known as a "dirty bomb") within the United States;
- received training from al Qaida operatives in furtherance of terrorist activities;
- met with other senior al Qaida operatives to discuss Padilla's involvement and participation in terrorist activities targeting the United States; and

- spent time in Afghanistan, Pakistan, Saudi Arabia, Egypt, and Southwest Asia.

Thus, Padilla could potentially provide information about, among other things:

- details on any potential plot to attack the United States in which he has been implicated, including the identities and whereabouts of al Qaida members possibly still at large in the United States and elsewhere;
- additional al Qaida plans to attack the United States, its property, or its citizens;
- al Qaida recruitment;
- al Qaida training;
- al Qaida planning;
- al Qaida operations;
- al Qaida methods;
- al Qaida infrastructure;
- al Qaida capabilities, including potential nuclear capabilities;
- other al Qaida members and sympathizers; and
- al Qaida activities in Afghanistan, Pakistan, Saudi Arabia, Egypt, Southwest Asia, the United States, or elsewhere.

The information that Padilla may be able to provide is time-sensitive and perishable. As noted above, any information obtained from Padilla must be assessed in connection with other intelligence sources; similarly, Padilla is a potential source to help assess information obtained from other sources. Any delay in obtaining

information from Padilla could have the severest consequences for national security and public safety.

Potential Impact of Granting Padilla Access to Counsel

Permitting Padilla any access to counsel may substantially harm our national security interests. As with most detainees, Padilla is unlikely to cooperate if he believes that an attorney will intercede in his detention. DIA's assessment is that Padilla is even more inclined to resist interrogation than most detainees. DIA is aware that Padilla has had extensive experience in the United States criminal justice system and had access to counsel when he was being held as a material witness. These experiences have likely heightened his expectations that counsel will assist him in the interrogation process. Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla.

Because Padilla is likely more attuned to the possibility of counsel intervention than most detainees, I believe that any potential sign of counsel involvement would disrupt our ability to gather intelligence from Padilla. Padilla has been detained without access to counsel for seven months—since the DoD took control of him on 9 June 2002. Providing him access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break—probably irreparably—the sense of dependency and trust that the interrogators are attempting to create.

At a minimum, Padilla might delay providing information until he believes that his judicial avenues of relief

have been exhausted. Given the nature of his case, his prior experience in the criminal justice system, and the length of time that has already elapsed since his detention, Padilla might reasonably expect that his judicial avenues of relief may not be exhausted for many months or years.

Moreover, Padilla might harbor the belief that his counsel would be available to assist him at any point and that seven months is not an unprecedented time for him to be without access to counsel.

Any such delay in Padilla's case risks that plans for future attacks will go undetected during that period, and whatever information Padilla may eventually provide will be outdated and more difficult to corroborate.

Additionally, permitting Padilla's counsel to learn what information Padilla may have provided to interrogators, and what information the interrogators may have provided Padilla, unnecessarily risks disclosure of the intelligence sources and methods being employed in the War on Terrorism.

In summary, the United States has an urgent and critical national security need to determine what Padilla knows. Padilla may hold extremely valuable information for the short-term and long-term security of the United States. Providing Padilla access to counsel risks the loss of a critical intelligence resource, and could affect our ability to detain other high value

terrorist targets and to disrupt and prevent additional terrorist attacks.

/s/ LOWELL E. JACOBY
LOWELL E. JACOBY, VADM, USN
Director of the Defense
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Supreme Court, U.S.
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No. 03-1027

In the Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
PETITIONER

v.

JOSE PADILLA AND DONNA R. NEWMAN, AS NEXT
FRIEND OF JOSE PADILLA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the district court has jurisdiction over the proper respondent to the amended habeas petition.

2. Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, to seize and detain a United States citizen in the United States based on a determination by the President that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts, or whether 18 U.S.C. 4001(a) precludes that exercise of Presidential authority.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-75a) is reported at 352 F.3d 695. The opinion of the district court (Pet. App. 76a-166a) is reported at 233 F. Supp. 2d 564.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2003. The petition for a writ of certiorari was filed on January 16, 2004, and was granted on February 20, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 18 U.S.C. 4001, 10 U.S.C. 956(5), and the President's order that Jose Padilla be detained as an enemy combatant are reprinted in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

1. On September 11, 2001, the United States endured a foreign enemy attack more savage, deadly, and destructive than any sustained on any one day in the Nation's history. That morning, agents of the al Qaeda terrorist network hijacked four commercial airliners loaded with passengers and jet fuel and flew the planes as missiles towards targets in the Nation's financial center and seat of government. Two of the planes struck the World Trade Center office towers in New York City just as the business day began, and a third hit the headquarters of the Department of Defense at the Pentagon. The fourth was brought down in Pennsylvania by its passengers before it could reach its target, presumed to be the United States Capitol or the White House. The

September 11 attacks killed approximately 3000 persons, exceeding the loss of life inflicted at Pearl Harbor. The attacks also caused injury to thousands more persons, destroyed hundreds of millions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President, acting as Commander in Chief, took immediate action to defend the country and prevent additional attacks. Congress swiftly enacted its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Authorization of Force or Authorization) (App., *infra*, 1a-2a). Congress emphasized that the forces responsible for the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Preamble, 115 Stat. 224.

The President ordered the armed forces of the United States to Afghanistan to subdue the al Qaeda terrorist network and the Taliban regime that supported it. In the course of those ongoing operations, United States and coalition forces have removed the Taliban from power, eliminated the "primary source of support to the terrorists who viciously attacked our Nation on September 11, 2001," and "seriously degraded" al Qaeda's training capabilities. Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept. 19, 2003) <www.whitehouse.gov/news/releases /2003/09/20030919-1.html>. Al Qaeda and the Taliban nonetheless remain a significant threat to United States and coalition forces. Moreover, Osama bin Laden has continued his call to al Qaeda and its supporters to maintain their war against the United States, and the United States and other nations

have been subject to attacks throughout the world. See, *e.g.*, *Tape urges Muslim fight against U.S.* (Feb. 12, 2003) <www.cnn.com/2003/ALLPOLITICS/02/11/powell.binladen/index.html>. See also *Qaeda Tapes Taunt U.S., France* (Feb. 24, 2004) <www.cbsnews.com/stories/2004/01/04/terror/main591217.shtml>. The continuing threat posed by al Qaeda is not confined to the United States' interests abroad. Rather, as Congress recognized in its Authorization of Force, it is imperative "to protect United States citizens both at home and abroad," and there remains a serious risk of future terrorist attacks carried out as were the attacks of September 11: by al Qaeda combatants who infiltrate the borders of the United States.[1]

2. In the context of both the removal of the Taliban from power and in the broader efforts to dismantle the al Qaeda terrorist network, the United States, consistent with the Nation's settled historical practice in times of war, has seized and detained numerous persons fighting for and associated with the enemy during the course of the ongoing military campaign. Jose Padilla, a.k.a., Abdullah Al Muhajir, is being

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[1] In a recent hearing before the Senate Armed Services Committee, the Director of the CIA testified that: al Qaeda "remains as committed as ever to attacking the US homeland"; al Qaeda "remains intent on obtaining, and using, catastrophic weapons"; "detainees consistently talk about the importance the group still attaches to striking the main enemy: the United States"; al Qaeda "remains interested in dirty bombs"; and "catastrophic attacks on the scale of 11 September remain within al Qa'ida's reach." *Current and Future Worldwide Threats to the National Security of the United States: Hearing Before the Senate Armed Services Comm.*, 108th Cong., 2d Sess. (2004) (statement of George Tenet) <www.senate.gov/~armedservices/statemnt/2004/March/Tenet.pdf>. A voice believed to be that of one of Osama bin Laden's top lieutenants warned in a recent audiotape: "Bush, fortify your targets, tighten your defense, intensify your security measures, because the fighting Islamic community—which sent you New York and Washington battalions—has decided to send you one battalion after another, carrying death and seeking heaven." *Qaeda Tapes Taunt U.S., France, supra.*

held by the military as an enemy combatant in connection with the conflict against al Qaeda.

a. On May 8, 2002, Padilla flew to Chicago from Pakistan, with an intermediate stop in Switzerland. Upon his arrival in Chicago, he was arrested pursuant to a material witness warrant issued by the United States District Court for the Southern District of New York in connection with grand jury proceedings investigating the September 11 attacks. On May 15, 2002, after Padilla's transfer to New York City, the district court appointed respondent Donna R. Newman, Esq., as Padilla's counsel. Pet. App. 4a-5a.

On June 9, 2002, the President, expressly invoking both his constitutional authority as Commander in Chief and Congress's Authorization of Force, determined that Padilla "is, and at the time he entered the United States in May 2002 was, an enemy combatant." App., *infra*, 5a. The President found, in particular: that Padilla is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war"; that he has "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States"; that he "possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda"; that he "represents a continuing, present and grave danger to the national security of the United States"; and that his detention as an enemy combatant "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." *Id.* at 5a-6a.

The President based his determination on information from sources directly connected with al Qaeda that Padilla is closely associated with al Qaeda and came to the United States to advance the conduct of terrorist operations on al Qaeda's behalf. See Pet. App. 167a-172a (8/27/02 Declaration

of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy) (Mobbs Declaration).[2] The information considered by the President evidenced that Padilla moved to Egypt in 1998 after his release from prison in the United States, and he subsequently became known as Abdullah Al Muhajir. Over the next three years, Padilla traveled to Pakistan, Saudi Arabia, and Afghanistan. During his time in the Middle East, Padilla was closely associated with the al Qaeda network and its leaders. *Id.* at 168a-169a.

While in Afghanistan and Pakistan during 2001 and 2002, Padilla had extended discussions with senior al Qaeda operatives concerning his conduct of terrorist operations within the United States. In Afghanistan during 2001, Padilla met with senior Osama bin Laden lieutenant Abu Zubaydah to discuss potential attacks on United States targets, including a plan to detonate a radiological dispersal device (or "dirty bomb") in the United States. Zubaydah directed Padilla to travel to Pakistan to receive training on the wiring of explosives, and Padilla researched explosive devices at an al Qaeda safehouse in Lahore. While in Pakistan during 2002, Padilla met on several occasions with senior al Qaeda operatives to further discuss planned terrorist operations within the United States, including the dirty bomb plan as well as other operations involving the detonation of explosives in hotel rooms and gas stations. At the direction of al Qaeda operatives, Padilla returned to the United States in May 2002 to advance the conduct of al Qaeda attacks against the United States. Pet. App. 169a-171a.

The President, acting on that information and pursuant to a formal finding, directed the Department of Defense "to receive Mr. Padilla from the Department of Justice and to

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[2] A classified version of the Mobbs Declaration providing additional detail concerning the determination that Padilla is an enemy combatant was submitted to the district court under seal and *ex parte*. The government has made arrangements with the Clerk of this Court to facilitate this Court's review of the classified declaration upon request.

detain him as an enemy combatant." App., *infra*, 6a. Upon issuance of the President's determination on June 9, 2002, the Department of Justice immediately asked the district court to vacate the material witness warrant. The district court vacated the warrant that day, and Padilla was transferred to military control and transported to the Naval Consolidated Brig, Charleston, South Carolina, for detention as an enemy combatant. Pet. App. 83a.

b. The President's determination to detain Padilla as an enemy combatant was the result of a careful, thorough, and deliberative process consisting of several layers of review. When a United States citizen is suspected of being an enemy combatant, the Office of Legal Counsel (OLC) in the Department of Justice makes an initial determination as to whether the individual, based on the information then available, satisfies the legal standard for enemy combatant status articulated by this Court in *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942) ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of * * * the law of war."). See 150 Cong. Rec. S2701, S2703-S2704 (daily ed. Mar. 11, 2004) (reprinting Feb. 24, 2004 remarks of Alberto Gonzales, White House Counsel, before the American Bar Association's Standing Committee on Law and National Security). After that initial determination, the Director of Central Intelligence (CIA) conducts a thorough assessment of all available CIA intelligence information concerning the individual and makes a recommendation to the Department of Defense (DoD) as to whether the person should be taken into custody as an enemy combatant. The Secretary of Defense then makes his own independent assessment based on the information provided by the CIA and other intelligence information developed within DoD. The Secretary's assessment, along with the intelligence information from both the CIA and DoD, is provided to the Attorney General with a

request for the Attorney General's opinion concerning: (1) whether the assessment comports with applicable law; (2) whether the individual may lawfully be taken into custody by the Department of Defense; and (3) whether the Attorney General recommends as a matter of policy that such a course be pursued. In addition to the materials provided by the CIA and DoD, the Attorney General bases his opinion on a memorandum from the Criminal Division setting out all the information available to it from the FBI and other sources concerning the individual, and a formal legal opinion from OLC analyzing whether the individual meets the *Quirin* standard for enemy combatant status. 150 Cong. Rec. at S2704.

The Secretary of Defense then transmits a package of all the intelligence information and recommendations to the President, including (i) the assessment and recommendations of the CIA; (ii) the recommendation and preliminary assessment by the Secretary of Defense; (iii) the DoD intelligence information; (iv) the Attorney General's letter to DoD, including his legal opinion and recommendation; (v) the Criminal Division's fact memo; and (vi) the OLC opinion. Lawyers at the White House review the materials, and the Counsel to the President forwards the package to the President along with his written recommendation. Finally, the President reviews all the materials and is briefed by his Counsel. If the President concludes that the person is an enemy combatant, as he did in Padilla's case, the President signs an order to that effect directing the Secretary of Defense to take him into his control. See 150 Cong. Rec. at S2704.

3. a. Two days after Padilla's transfer to military control in South Carolina, on June 11, 2002, Padilla's counsel, respondent Donna R. Newman, filed a habeas petition in the district court challenging the legality of his detention. See J.A. 1-2. On June 19, 2002, respondent, styling herself as Padilla's next friend, filed an amended habeas petition on Padilla's behalf. J.A. 46-58. The amended petition names as respon-

dents the President, the Secretary of Defense, the Attorney General, and Commander Melanie A. Marr, Commanding Officer of the Naval Consolidated Brig, Charleston, South Carolina, where Padilla is being held. J.A. 3, 46. The amended petition alleges that Padilla's detention violates the Fourth, Fifth, and Sixth Amendments to the Constitution, as well as the Posse Comitatus Act, 18 U.S.C. 1385. J.A. 53-55. Neither the petition nor the amended petition mentions 18 U.S.C. 4001(a). As relief, the amended petition seeks, *inter alia*, Padilla's release from military control. J.A. 56.

On June 26, 2002, the government filed a motion to dismiss the amended petition for lack of jurisdiction, arguing: (i) that respondent Newman lacks standing as a next friend to file the amended petition on Padilla's behalf; and (ii) that the district court lacks territorial jurisdiction over the proper respondent to the amended petition—Commander Marr, Padilla's immediate custodian at the Naval Consolidated Brig, Charleston—such that the petition should have been filed in the District of South Carolina. On August 27, 2002, in response to the district court's direction to address the merits, the government filed a response to and motion to dismiss the amended petition on the merits. In connection with that motion, the government submitted the Mobbs Declaration setting forth the factual underpinnings of the President's determination that Padilla is an enemy combatant. Pet. App. 7a, 167a-172a.

b. On December 4, 2002, the district court issued an opinion and order resolving the jurisdictional claims and several of the issues on the merits. Pet. App. 76a-166a. On the jurisdictional issues, the court first ruled that respondent Newman had a sufficient relationship with Padilla to qualify as his next friend for standing purposes. *Id.* at 91a-97a. The court next addressed whether it has jurisdiction over the proper respondent to the amended petition. The court acknowledged that, "in the usual habeas corpus case * * * courts have held consistently that the proper respondent is

the warden of the prison where the prisoner is held." *Id.* at 98a. The court nevertheless held that Secretary Rumsfeld rather than Commander Marr is the proper respondent in this case, and further held that Secretary Rumsfeld is subject to the court's habeas jurisdiction pursuant to the New York long-arm statute. *Id.* at 98a-108a, 116a-117a.[3]

On the merits, the district court agreed with the government that the settled wartime authority of the Commander in Chief to capture and detain enemy combatants is fully applicable in the circumstances of this case. Pet. App. 119a-135a. The court relied principally on *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld the exercise of military jurisdiction over German saboteurs (including one presumed to be an American citizen) who were captured within the borders of the United States during World War II before they could carry out plans to destroy United States war facilities. The court rejected respondents' invocation of 18 U.S.C. 4001(a), which states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The court explained that Padilla's detention is "pursuant to an Act of Congress," because Congress's Authorization of Force broadly supports the application of military force to prevent future acts of terrorism by al Qaeda. Pet. App. 141a-142a. Accordingly, the court ruled, the "President * * * has both constitutional and statutory authority to exercise the powers of Commander in Chief * * * and it matters not that Padilla is a United States citizen captured on United States soil." *Id.* at 158a. While upholding the President's legal authority to detain Padilla, the court granted Padilla access to counsel pursuant to the All

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[3] The district court dismissed the President as a respondent, citing concerns about its authority "to direct the President to perform an official act." Pet. App. 106a-108a (discussing *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992)); accord *Al-Marri* v. *Rumsfeld*, No. 03-3674, 2004 WL 415279, at *1 (7th Cir. Mar. 8, 2004). Respondent raised no challenge on appeal to the dismissal of the President.

Writs Act, 28 U.S.C. 1651(a), in order to facilitate litigation of the habeas petition. Pet. App. 142a-155a.

c. On January 9, 2003, the government moved for reconsideration of that part of the district court's order directing that Padilla be afforded access to counsel. Pet. App. 8a; C.A. App. 154. The government submitted a sworn declaration of Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency, which explains the significant national security concerns raised by interposing counsel into the military's efforts to obtain vital intelligence from detained enemy combatants. J.A. 75-88. On March 11, 2003, the district court issued an opinion and order granting reconsideration but adhering to its previous disposition. Pet. App. 9a.

d. The district court granted the government's motion for an interlocutory appeal of its orders pursuant to 28 U.S.C. 1292(b), and the court of appeals accepted the parties' application for interlocutory review. Pet. App. 10a.

4. A divided panel of the court of appeals affirmed in part and reversed in part. Pet. App. 1a-75a.

a. The court first sustained the district court's assertion of habeas jurisdiction over the amended petition. Pet. App. 13a-26a.[4] In the court's view, although the general rule in habeas cases calls for naming the "immediate physical custodian as respondent," that rule need not apply in the case of a

[4] The court also found as a threshold matter that respondent Newman had established next-friend standing to file the amended petition on Padilla's behalf. Pet. App. 10a-13a. Next-friend standing arises when the detainee is inaccessible and thus unable to seek relief on his own behalf. See *Whitmore* v. *Arkansas*, 495 U.S. 149, 163 (1990). This Court has indicated that, to establish standing, "a 'next friend' must have some significant relationship with the real party in interest." *Id.* at 164. The government argued below that respondent Newman's limited interactions with Padilla before his transfer to military control were insufficient to establish a "significant relationship," and that Padilla's mother or other close relative should serve as next friend. Since the court of appeals' decision, the military has allowed Padilla access to respondent Newman. See note 5, *infra*. Because Padilla is no longer inaccessible, the petition can be amended on remand to convert it to a direct petition.

person "detained for reasons other than federal criminal violations." *Id.* at 15a. The court found Secretary Rumsfeld to be a proper respondent in this case, reasoning that "the legal reality of control is vested with Secretary Rumsfeld" because he "could inform the President that further restraint of Padilla as an enemy combatant is no longer necessary." *Id.* at 20a. The court also rejected the government's contention that, in a challenge to a detainee's present, physical confinement, a district court's habeas jurisdiction is limited to the district's territorial boundaries. The court instead ruled that habeas jurisdiction extends to any respondent subject to suit under the long-arm statute of the state in which the district court sits. *Id.* at 21a-26a.

b. On the merits, the panel majority concluded that the President lacks legal authority to detain Padilla as an enemy combatant, and that he must be released from military control. Pet. App. 26a-55a. The court first held that "the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat." *Id.* at 29a. The court rejected the district court's reliance on *Quirin*, reasoning that *Quirin* involved congressional authorization absent in this case. *Id.* at 37a-38a. The court thus held that any authority to detain Padilla as an enemy combatant must come from Congress. *Id.* at 36a.

The majority next concluded that Congress had prohibited Padilla's detention in 18 U.S.C. 4001(a). Pet. App. 43a-55a. The court read Section 4001(a) to prohibit all detentions of United States citizens—including the wartime detention of enemy combatants by the military—except pursuant to specific statutory authorization. *Id.* at 43a. The court rejected the conclusion of the district court that Congress's Authorization of Force supplies a basis for Padilla's detention, reasoning that the Authorization does not encompass the detention of "American citizens seized on American soil and not actively engaged in combat." *Id.* at 51a.

The court remanded the case to the district court with instructions to issue a writ of habeas corpus directing Padilla's release from military control within 30 days. Pet. App. 55a. The court explained that its holding that the President lacks legal authority to detain Padilla "effectively moots arguments raised by both parties concerning access to counsel, standard of review, and burden of proof." *Id.* at 4a n.1.[5]

c. Judge Wesley dissented from the majority's conclusion that the President lacks legal authority to detain Padilla as an enemy combatant. Pet. App. 61a-75a. In Judge Wesley's view, "the President, as Commander in Chief, has inherent authority to thwart acts of belligerency on U.S. soil that would cause harm to U.S. citizens, and, in this case, Congress through the [Authorization of Force] specifically and directly authorized the President to take the actions herein contested." *Id.* at 62a. The majority's assumption that the Commander-in-Chief authority is confined to "zones of combat," Judge Wesley explained, entails the "startling conclusion" that the "President would be without any authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat *or* authorized the detention." *Id.* at 66a. In any event, Judge Wesley observed, Congress's Authorization of Force "was *not* limited in geographic scope" and "did not limit the President's authority to foreign theaters." *Id.* at 73a. In Judge Wesley's view, Congress "clearly recognized that the events of 9-11 signaled a war with al Qaeda that could be waged on U.S. soil." *Ibid.*

[5] Notwithstanding that the court of appeals' disposition "effectively moots" (Pet. App. 4a n.1) any issues concerning the process by which respondent may raise a factual challenge to the President's determination that Padilla is an enemy combatant—including whether Padilla is entitled to meet with counsel for that purpose—respondent argued in the brief in opposition (at 19-23) that the Court should grant review on such issues and should expand the questions presented correspondingly. This Court did not do so, instead granting certiorari without modifying the questions presented by the petition. Any issues concerning access to counsel or the extent to which respondent may raise a factual challenge thus are not properly before the Court. Moreover, as the government explained in its reply brief supporting the petition (at 7 n.6), on February 11, 2004, the Department of Defense determined that Padilla should be allowed access to counsel subject to appropriate security restrictions. See <www.defenselink.mil/ releases/2004/nr20040211-0341.html>.

SUMMARY OF ARGUMENT

I. This case raises fundamental questions about the authority of the Commander in Chief in a time of war, questions that should only be addressed by a court with jurisdiction to pass on them. The court of appeals erred in this case in holding that jurisdiction lies in the Southern District of New York over a habeas challenge to Padilla's present, physical confinement in South Carolina.

A. Under the terms of the habeas statutes, the proper respondent in a habeas challenge to present confinement is the person with day-to-day physical control over the detainee, *i.e.*, the immediate physical custodian. The court of appeals nonetheless ruled that the proper respondent in this proceeding is the Secretary of Defense rather than the Commanding Officer of the facility where Padilla is held, Commander Marr. The court based that conclusion on its perception that Secretary Rumsfeld has ultimate legal authority to determine the duration of Padilla's confinement. That approach contradicts the terms of the habeas statutes and the decisions of this Court, which dictate that the proper respondent is the person with physical custody of the detainee, not a supervisory official with legal control.

B. The habeas statutes confine district courts to issuing the writ "within their respective jurisdictions," 28 U.S.C. 2241(a), a limitation intended to prevent habeas courts from reaching custodians located beyond the territorial borders of the federal district in which the court sits. The court of appeals nonetheless ruled that a habeas petition may be filed in any district court that can reach the custodian under the forum state's long-arm statute. That conclusion cannot be

reconciled with the statutory direction that courts exercise habeas jurisdiction only "within their respective jurisdictions." Nor can it be squared with this Court's holding that the statute providing for nationwide service of process against federal officials fails to permit habeas courts to reach beyond their territorial jurisdiction.

II. The President made a determination as Commander in Chief and pursuant to Congress's Authorization of Force that Padilla is an enemy combatant closely associated with al Qaeda and should be detained as such in the course of the ongoing conflict. That decision falls squarely within the President's core constitutional powers in a time of war and within the authority conferred by Congress in the Authorization of Force. The long-settled authority of the Commander in Chief to seize and detain enemy combatants is not limited to aliens or foreign battlefields and is fully applicable in the circumstances of this case. See *Ex parte Quirin*, 317 U.S. 1 (1942).

The court of appeals fundamentally erred in invalidating Padilla's detention on the ground that Congress has failed to authorize the President to exercise his Commander-in-Chief powers over an American citizen captured in the United States. First, the President's inherent powers as Commander in Chief are substantially more robust than recognized by the court of appeals. The authority of the Commander in Chief to engage and defeat the enemy encompasses the capture and detention of enemy combatants wherever found, including within the Nation's borders. That is particularly true in the current conflict in view of the nature of the September 11 attacks, which were perpetrated by combatants who had assimilated into the civilian population and launched their attacks from within the United States.

Congress, in any event, through the Authorization of Force, broadly supported the President's use of "*all* necessary and appropriate force" against those responsible for the September 11 attacks "in order to prevent *any* future acts of

international terrorism against the United States." § 2(a), 115 Stat. 224 (emphasis added). The President's basic power to capture and detain enemy combatants necessarily falls within and is reinforced by the broad terms of Congress's authorization. Moreover, nothing in the Authorization suggests that Congress intended to withhold support for the President's exercise of Commander-in-Chief authority over combatants found within the Nation's borders. To the contrary, Congress acted against the backdrop of the decision in *Quirin* upholding the exercise of military jurisdiction over combatants seized in the United States, Congress was acting in immediate response to attacks carried out within the Nation's borders, and Congress specifically noted the need to "protect United States citizens both at home and abroad," Preamble, 115 Stat. 224.

Nothing in 18 U.S.C. 4001(a) suggests that the President lacks authority to detain Padilla as an enemy combatant. First, because the President explicitly acted pursuant to Congress's Authorization of Force, as well as his powers as Commander in Chief, Padilla's detention is "pursuant to an Act of Congress" within the meaning of Section 4001(a). In any event, Section 4001(a) applies only to the detention of citizens at the hands of *civilian* authority, not detentions of enemy combatants under the laws of war. Section 4001(a) repealed the Emergency Detention Act of 1950, which authorized detentions by the Attorney General. And the context surrounding Section 4001(a)'s enactment confirms that Congress was concerned exclusively with detention pursuant to civilian authority and had no intention to affect the long-settled authority of the military to detain enemy combatants, including those who are American citizens.

ARGUMENT

I. THE DISTRICT COURT LACKS JURISDICTION OVER THE PROPER RESPONDENT TO THE AMENDED HABEAS PETITION

This case presents questions of exceptional national significance concerning the authority of the Commander in Chief to wage the ongoing conflict against al Qaeda. The court of appeals' approach to those issues was seriously flawed and warrants reversal. But the court also erred as an antecedent matter in holding that the district court properly asserted jurisdiction over the amended habeas petition. In a case raising sensitive questions of the magnitude and character presented here, it is especially important that a court be assured of its jurisdiction lest it pronounce on the merits of such questions without any authority to do so. See *Hamdi* v. *Rumsfeld*, 294 F.3d 598, 606-607 (4th Cir. 2002). That is what happened below.

The habeas statutes dictate, in the context of core habeas challenges to present, physical confinement, that the proceedings take place in the federal district of confinement. The habeas laws effectuate that territorial constraint through two complementary requirements. First, the detainee must bring his challenge to his present, physical detention against his immediate, on-site custodian rather than a supervisory official located in another, potentially far-removed district. Second, in such cases, a district court can issue the writ only within its territorial jurisdiction rather than reaching out to issue the writ against custodians located in other judicial districts. Those settled rules direct that the amended petition in this case should have been filed against Padilla's immediate custodian and heard in the District of South Carolina, not the Southern District of New York. The court of appeals misconceived both aspects of the jurisdictional inquiry.

A. The Proper Respondent To The Amended Habeas Petition Is Padilla's Immediate Physical Custodian, Commander Marr

1. The proper respondent in a habeas challenge to present, physical confinement is the person with day-to-day physical control over the detainee—*i.e.*, the immediate, on-site custodian, typically the warden or Commanding Officer of the facility. That settled rule is dictated by the terms of the habeas statutes. Those laws have long specified that the writ "shall be directed to *the person* having custody of the person detained." 28 U.S.C. 2243 (emphasis added); see Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386. The focus on "the person" with control over the detainee is reinforced by the requirements that the petitioner "allege * * * the name of the person who has custody over him," 28 U.S.C. 2242, and that, in appropriate situations, "the person to whom the writ is directed shall * * * produce at the hearing the body of the person detained," 28 U.S.C. 2243.

This Court established long ago that the proper respondent under those provisions is the detainee's immediate physical custodian. In *Wales* v. *Whitney*, 114 U.S. 564 (1885), upon reviewing the requirements that the writ be directed to "the person" with custody over the detainee and that the custodian be situated to bring the body of the detainee before the habeas court, the Court explained: "All these provisions contemplate a proceeding against some person who has the *immediate custody* of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." *Id.* at 574 (emphasis added). The Court has not departed from that understanding. See *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 494-495 (1973) (citing *Wales* and observing that the "writ of habeas

corpus" acts upon "the person who holds [the detainee] in what is alleged to be unlawful custody").[6]

In accordance with this Court's direction, a long line of decisions in the courts of appeals holds that the proper habeas respondent in a challenge to present confinement is the detainee's immediate physical custodian. See, *e.g.*, *Robledo-Gonzalez* v. *Ashcroft*, 342 F.3d 667, 673 (7th Cir. 2003); *Vasquez* v. *Reno*, 233 F.3d 688, 690-691 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); *Monk* v. *Secretary of the Navy*, 793 F.2d 364, 369 (D.C. Cir. 1986); *Jones* v. *Biddle*, 131 F.2d 853, 854 (8th Cir. 1942), cert. denied, 318 U.S. 784 (1943). Those decisions reject claims that a supervisory official such as the Attorney General is a proper respondent, ruling instead that the proper custodian under the habeas laws is the warden or facility commander with day-to-day physical control. *E.g.*, *Vasquez*, 233 F.3d at 693; *Monk*, 793 F.2d at 369.

The Seventh Circuit recently applied that rule in a habeas action filed by a detained enemy combatant, rejecting the court of appeals' analysis in this case and holding unanimously that the proper respondent is the brig commander rather than the Secretary of Defense. *Al-Marri* v. *Rumsfeld*, No. 03-3674, 2004 WL 415279, at *2 (7th Cir. Mar. 8, 2004). The enemy combatant in that case, like Padilla and Yaser Esam Hamdi, see *Hamdi* v. *Rumsfeld*, No. 03-6696 (cert. granted Jan. 9, 2004), is being held at the Consolidated

[6] A separate aspect of the Court's decision in *Wales* concerned the circumstances in which a person is "in custody" within the meaning of the habeas laws. The Court has since expanded its understanding of the "custody" requirement. See *Hensley* v. *Municipal Court*, 411 U.S. 345, 350 n.8 (1973). The expansion of the notion of "custody" has enabled a habeas petitioner in some situations to challenge a form of custody other than his present, physical confinement. In *Braden*, for example, the Court permitted a habeas petition against a future detaining authority based on *Peyton* v. *Rowe*, 391 U.S. 54 (1968), which had overruled *McNally* v. *Hill*, 293 U.S. 131 (1934), and thereby relaxed the "custody" requirement so as to allow a challenge to "confinement that would be imposed in the future." *Braden*, 410 U.S. at 489; see pp. 20-21, *infra*.

Naval Brig, Charleston, South Carolina. See *Al-Marri*, 2004 WL 415279, at *1. The Seventh Circuit explained that "Commander Marr of the Naval Brig is Al-Marri's custodian. Secretary Rumsfeld is Marr's (remote) superior, and no more an appropriate respondent on that account than is the Attorney General when a convicted federal prisoner or an alien detained pending removal seeks a writ of habeas corpus." *Id.* at *2. Cf. 10 U.S.C. 951(c) (providing that Commanding Officer of military correctional facility "shall have custody and control" of persons confined in facility).

2. The court of appeals' contrary conclusion was based on a mistaken belief that the requirement to name the immediate custodian is inapplicable when the petitioner is "detained for reasons other than federal criminal violations." Pet. App. 15a. However, there is a single federal habeas statute for criminal and non-criminal detentions, and the terms of the statute require the writ to be directed to the person with day-to-day physical control over the detainee. Nothing in the relevant statutory language suggests any pertinent distinction between criminal and non-criminal detentions. See *Vasquez*, 233 F.3d at 693. In either case, the proper respondent is the "person having custody of the person detained," who is best situated to "produce * * * the body of the person detained" if necessary. 28 U.S.C. 2243.

The court of appeals also emphasized (Pet. App. 20a) that Secretary Rumsfeld owns "the legal reality of control" because he is in a position to advise the President concerning when Padilla's detention as an enemy combatant may no longer be necessary. But that argument does not distinguish this case from any other habeas proceeding: *no* prison warden or facility commander has independent authority to determine the duration of a detainee's confinement. As the Seventh Circuit explained in *Al-Marri*, "there is a difference between authorizing and exercising custody." 2004 WL 415279, at *1. A host of officials from the sentencing judge to the prosecutor may play a role in determining the length of a

detainee's confinement, but "for an inmate of a brig, jail, or prison, the 'custodian' is the person in charge of that institution." *Id.* at *1.

3. The court of appeals erroneously viewed this Court's decisions in *Braden*, 410 U.S. at 484, and *Strait* v. *Laird*, 406 U.S. 341 (1972), as signifying a general relaxation of the requirement to name the immediate physical custodian. Pet. App. 16a-20a. But those cases involve challenges to a form of custody other than present, physical confinement. They do nothing to suggest a deviation from the immediate custodian rule in the context of a classic habeas challenge to ongoing physical detention. See *Jones* v. *Cunningham*, 371 U.S. 236, 238 (1963) ("[T]he chief use of habeas corpus has been to seek the release of persons held in actual, physical custody.").

The petitioner in *Braden* was confined in Alabama for an Alabama conviction but was also subject to a detainer lodged by Kentucky officials based on an outstanding Kentucky indictment. Because the habeas challenge was to the petitioner's legal custody under the Kentucky detainer rather than his present, physical custody in Alabama, the Court upheld the filing of the petition in Kentucky, the location of the relevant custodian. See 410 U.S. at 499-500; *Hensley*, 411 U.S. at 351 n.9 (petitioner in *Braden* "was in the custody of Kentucky officials for purposes of his habeas corpus action"). *Braden* thus affords no grounds for deviating from the well-settled rules governing a habeas challenge to present, physical confinement. Such a challenge must be brought against the on-site, immediate custodian in the district of confinement.[7]

[7] See *Al-Marri*, 2004 WL 415279, at *5 (explaining that reading *Braden* to relax the immediate custodian rule is a "non sequitur," and that "when there is only one custody and one physical custodian, that person is the proper respondent, and the district in which the prison is located the proper district"); *Monk*, 793 F.2d at 369 ("[n]othing in *Braden* supports" departing from immediate custodian rule).

The Court's decision in *Strait* v. *Laird*, *supra*, is inapposite for essentially the same reasons. That case involved an unattached military reservist seeking discharge from a service obligation as a conscientious objector. An unattached reservist is not subject to physical confinement or to the day-to-day physical control of any custodian. See 406 U.S. at 344-345. Where physical confinement is not in issue, the requirement to name as respondent "the person having custody of the person *detained*" (28 U.S.C. 2243 (emphasis added)) by definition is not an immediate physical custodian. It therefore "is necessary to identify as a 'custodian' someone who asserts the legal right to control that is being contested in the litigation." *Al-Marri*, 2004 WL 415279, at *5. The need to select a nominal custodian in those circumstances does not mean that, in a challenge to present, physical confinement, the detainee is free to name someone other than the immediate physical custodian. *Ibid.*; see *Vasquez*, 233 F.3d at 695-696. This case involves such a challenge; and the proper respondent therefore is Padilla's immediate custodian, Commander Marr.[8]

B. A Habeas Court Cannot Reach Respondents Located Beyond The Court's Territorial Jurisdiction

The habeas laws confine a district court to issuing the writ within the territorial boundaries of the judicial district. 28 U.S.C. 2241(a). Because Padilla's immediate custodian, Commander Marr, is located in the District of South Carolina, the district court lacked jurisdiction over the amended petition.

[8] The court of appeals erred in relying (Pet. App. 16a) on *Ex parte Endo*, 323 U.S. 283 (1944). There, a Japanese-American detained in a California internment camp during World War II filed a habeas petition in a California district court, properly naming her immediate custodian as a respondent. The Court permitted the action to proceed notwithstanding that the government later moved her to Utah. *Id.* at 306-307. *Endo* is of no assistance to respondent in this case because the detainee there sought relief in the jurisdiction in which her immediate custodian was located, which is precisely what the habeas statutes require, and precisely what respondent failed to do here.

Indeed, because Secretary Rumsfeld is located in the Eastern District of Virginia, see *Monk*, 793 F.2d at 369 n.1, the district court would have lacked jurisdiction even if Secretary Rumsfeld were a proper respondent.

1. The terms of the habeas laws establish a strict territorial limitation on the reach of a district court's habeas jurisdiction, specifying that "[w]rits of habeas corpus may be granted by" the "district courts * * * *within their respective jurisdictions.*" 28 U.S.C. 2241(a) (emphasis added). That express territorial constraint originated in Congress's 1867 revision of the habeas laws. § 1, 14 Stat. 235.

Congress added the language confining district courts' habeas authority to "their respective jurisdictions" to address concerns that, without the amendment, "a judge of a United States court in one part of the Union would be authorized to issue a writ of *habeas corpus* to bring before him a person confined in another and a remote part of the Union." Cong. Globe, 39th Cong., 2d Sess. 790 (1867) (remarks of Sen. Trumbull); see *Carbo* v. *United States*, 364 U.S. 611, 616-617 (1961). As this Court has explained, Congress thought it "inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat." *Id.* at 617. The result is that the "Great Writ" is "issuable only in the district of [the challenged] confinement." *Id.* at 618; see *Al-Marri*, 2004 WL 415279, at *5; *Monk*, 793 F.2d at 369.

2. The court of appeals gave short shrift to the argument that Section 2241(a) requires a habeas petition to be brought in the district where the immediate custodian is located, *i.e.*, the district of the challenged confinement. See Pet. App. 21a-23a. According to the court of appeals, a district court's habeas jurisdiction extends to *any* custodian within reach of the court's process in an ordinary civil action, which is generally defined by the long-arm statute of the state in which the

court sits. *Id.* at 23a; see Fed. R. Civ. P. 4(k)(1)(A). That capacious understanding of habeas jurisdiction is flatly incompatible with the terms and purposes of the habeas statute.

a. If a habeas court's jurisdiction were defined by the reach of the state long-arm statute, district courts in every district with the requisite contacts with the custodian would have jurisdiction over a particular habeas action. Such overlapping and duplicative habeas jurisdiction is squarely foreclosed by the statutory restriction that district courts may issue the writ only "within their respective jurisdictions." 28 U.S.C. 2241(a). Indeed, Congress's entire purpose in adding that language was precisely to foreclose a district court from issuing process beyond the district's territorial borders. Congress thus required in Section 2241(a) that a habeas action be brought in the district of the challenged confinement. See *Carbo*, 364 U.S. at 616-618.[9]

The habeas laws elsewhere reinforce the conclusion that there is only one district court with territorial jurisdiction in any given habeas case. The statutes prescribe that the "Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application * * * to *the* district court having jurisdiction to entertain it." 28 U.S.C. 2241(b) (emphasis added). To the same effect, a habeas application "addressed to the Supreme Court, a justice thereof or a circuit judge" must "state the reason for not making application to *the* district court of the district in which the applicant is held." 28 U.S.C. 2242 (emphasis added). The Federal Rules likewise provide that an "application for a writ of habeas corpus must be made to *the* appropriate district court." Fed. R. App. P. 22(a) (emphasis added).

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[9] See also Cong. Globe, 39th Cong., 2d Sess. 790 (1867) (remarks of Sen. Johnson) (observing that addition of phrase "within their respective jurisdictions" addresses "practical evil" that would result if a habeas court could "issue process [that] extends all over the Union").

Conversely, when Congress intends to vest habeas jurisdiction in more than one district court, it does so explicitly. For instance, the habeas statutes provide that when the petitioner is "in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed" not only "in the district court for the district wherein such person is in custody," but also "in the district court for the district within which the State court was held which convicted and sentenced him," and "each of such district courts shall have *concurrent jurisdiction* to entertain the application." 28 U.S.C. 2241(d) (emphasis added). That provision would have been unnecessary if the court of appeals' understanding of the scope of habeas jurisdiction were correct. See *Al-Marri*, 2004 WL 415279, at *3.[10]

b. The court of appeals assumed that a habeas court remains "within [its] respective jurisdiction[]" under the habeas statutes (28 U.S.C. 2241(a)) as long as the Federal Rules of Civil Procedure would permit the court to reach the respondent in a general civil action. See Pet. App. 23a. That approach confuses the basic question of statutory jurisdiction with the separate issue of the procedures for service of process. See *Al-Marri*, 2004 WL 415279, at *3. The Federal Rules themselves make clear that they do not "extend or limit the jurisdiction of the United States district courts." Fed. R. Civ. P. 82; accord *Kontrick* v. *Ryan*, 124 S. Ct. 906, 914 (2004). And with respect to habeas jurisdiction in particular, the Rules provide that they apply in habeas proceedings only "to the extent that the practice in such proceedings is not set forth in statutes of the United States." Fed. R. Civ. P. 81(a)(2). As a result, the Federal Rules can-

[10] The same conclusion follows with respect to 28 U.S.C. 2255, which was added to enable federal prisoners to bring post-conviction challenges in the sentencing court rather than in the district of confinement. See *United States* v. *Hayman*, 342 U.S. 205, 212-219 (1952).

not alter the territorial constraint established by Congress in Section 2241(a).

This Court made the point clear in *Schlanger* v. *Seamans*, 401 U.S. 487 (1971). After reaffirming that "jurisdiction over [a habeas] respondent [is] territorial," *id.* at 490, the Court held that the territorial constraint on district courts was unaffected by the enactment of 28 U.S.C. 1391(e), the statute providing for nationwide service of process against federal officials. The Court explained that the statute "was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia," but there was no "indication that Congress extended habeas corpus jurisdiction." 401 U.S. at 490 n.4. If a federal *statute* providing for nationwide service of process fails to relax the territorial limits on habeas courts, a federal *rule* providing for service of process under long-arm statutes necessarily leaves those territorial constraints unaffected.[11]

c. Contrary to the court of appeals' view (Pet. App. 22a-23a), nothing in this Court's decisions in *Braden* or *Strait* suggests that the district court could venture beyond its territorial jurisdiction to reach respondents located elsewhere. In *Braden*, because the challenge was to the petitioner's legal custody under the Kentucky detainer, the relevant custodian was located in Kentucky, and the petition was filed in Kentucky. Although the Court observed that habeas jurisdiction lies "[s]o long as the custodian can be reached by service of process," 410 U.S. at 495, the Court went on to explain that "the respondent was properly served *in that district*," *i.e.*, within the district's territorial boundaries, *id.* at 500 (emphasis added). *Braden* thus had no occasion to consider service against custodians located outside the judicial

[11] The court of appeals' evisceration of the territorial constraints on habeas jurisdiction not only is foreclosed by the statute, but it creates the potential for "one idiosyncratic district or appellate court anywhere in the nation [to] insist that the entire federal government dance to its tune." *Al-Marri*, 2004 WL 415279, at *3.

district in which suit was brought. See *Al-Marri*, 2004 WL 415279, at *5 ("Braden sued his Kentucky custodian in Kentucky, just as § 2241(a) provides."); see also *Guerra* v. *Meese*, 786 F.2d 414, 417 (D.C. Cir. 1986) ("The *Braden* decision in no way stands for the proposition * * * that federal courts may entertain a habeas corpus petition when the custodian is outside their territorial jurisdiction.").

Strait, as explained, involved an unattached reservist not subject to physical confinement. The Court permitted the petitioner to file in California, where he resided and "where he had had his only meaningful contact with the Army." 406 U.S. at 343. The Court found that it would "exalt fiction over reality" to require him to seek relief in Indiana, the location of the "nominal custodian" who held his records, and where the petitioner had never been. *Id.* at 344. Because *Strait* permits filing where the effects of custody in fact were felt by the petitioner, the decision provides no authority for extending jurisdiction beyond the district of custody, particularly in a case involving physical confinement rather than a mere "nominal" custodian. See *Al-Marri*, 2004 WL 415279, at *5; *Vasquez*, 233 F.3d at 695 n.6.[12]

Consequently, neither *Strait* nor *Braden* affect the statutory restriction that district courts may issue the writ only "within their respective jurisdictions." 28 U.S.C. 2241(a). That provision forecloses the district court's assertion of habeas jurisdiction in this case.

[12] This Court's decision in *Endo*, like *Braden* and *Strait*, refers to service of process, see 323 U.S. at 307, but as explained (note 8, *supra*), *Endo* involved a petition initially filed within the territorial jurisdiction of the district of detention. When the detainee was subsequently moved, the court where the petition was initially and properly filed did not lose jurisdiction.

II. THE PRESIDENT HAS AUTHORITY AS COMMANDER IN CHIEF AND PURSUANT TO CONGRESS'S AUTHORIZATION FOR USE OF MILITARY FORCE TO ORDER PADILLA'S DETENTION AS AN ENEMY COMBATANT

The President, explicitly invoking both his constitutional authority as Commander in Chief and the authority recognized by Congress in its Authorization of Force, determined that Padilla is "closely associated with al Qaeda," has engaged in "hostile and war-like acts," and "represents a continuing, present and grave danger to the national security," and that it therefore "is in the interest of the United States" that Padilla be detained by the military as an enemy combatant. App., *infra*, 5a-6a. That determination was the product of a careful, thorough, and multi-layered process of review incorporating independent recommendations based on all available intelligence information and legal and policy analyses of, among others, the Central Intelligence Agency, the Department of Defense, the Department of Justice, the White House Counsel and, ultimately, the President of the United States. See 150 Cong. Rec. S2701, S2703-S2704 (daily ed. Mar. 11, 2004) (reprinting Feb. 24, 2004 remarks of Alberto Gonzales, White House Counsel, before the American Bar Association's Standing Committee on Law and National Security). The President's determination lies at the heart of his constitutional powers as Commander in Chief, and it is fully supported by Congress's broad grant of authority to the President. The court of appeals' decision setting aside a core wartime determination of the Commander in Chief was both unprecedented and fundamentally in error.

A. The Authority Of The Military To Seize And Detain Enemy Combatants In Wartime Is Well Settled

1. "This Court has characterized as 'well-established' the 'power of the military to exercise jurisdiction over * * * enemy belligerents [and] prisoners of war." *Johnson* v.

Eisentrager, 339 U.S. 763, 786 (1950) (quoting *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313 (1946)). The capture and detention of enemy combatants is an essential aspect of warfare, and represents a core exercise of the President's constitutional powers as Commander in Chief. Accordingly, the United States military has seized and detained enemy combatants in virtually every significant armed conflict in the Nation's history, including in the current conflict against al Qaeda. That settled historical practice is deeply rooted in the laws and customs of war.

As this Court recognized in *Ex parte Quirin*, 317 U.S. 1 (1942), the "universal agreement and practice" under the "law of war" holds that enemy combatants are "subject to capture and detention * * * by opposing military forces." *Id.* at 30-31. While all enemy combatants are subject to capture and detention for the duration of an armed conflict, the "law of war" draws a "distinction between * * * those who are lawful and unlawful combatants." *Ibid.* "Lawful" combatants, so named because they adhere to the conditions of lawful belligerency such as wearing fixed insignia and openly displaying arms, are immune from prosecution for their hostile acts and entitled to treatment as prisoners of war when detained. *Id.* at 31; see Pet. App. 127a. "Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 31; see *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 463 (4th Cir. 2003), cert. granted, 124 S. Ct. 981 (2004); *Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946); *Ex parte Toscano*, 208 F. 938, 940 (S.D. Cal. 1913).

2. The detention of enemy combatants serves two vital purposes directly connected to prosecuting the war. First, detention prevents captured combatants from rejoining the enemy and continuing the fight. See *Hamdi*, 316 F.3d at 465; *Territo*, 156 F.2d at 145. Second, detention enables the military to gather critical intelligence from captured combatants concerning the capabilities and intentions of the enemy. See J.A. 75-88 (Jacoby Decl.); see also Int'l Comm. of the Red Cross, Commentary III, Geneva Convention Relative to the Treatment of Prisoners of War 163-164 (Jean S. Pictet & Jean de Preux eds. 1960) ("[A] state which has captured prisoners of war will always try to obtain information from them."); United States Dep't of the Army, *The Law of Land Warfare*, Field Manual 27-10, ¶ 48 (1956) ("[T]he employment of measures necessary for obtaining information about the enemy and the country are considered permissible."). Those war-related purposes categorically distinguish the military's detention of enemy combatants in wartime from detention at the hands of civilian authorities. The detention of enemy combatants is "neither a punishment nor an act of vengeance," but is a "simple war measure." William Winthrop, *Military Law and Precedents* 788 (2d ed. 1920); see *Hamdi*, 316 F.3d at 465.

The intelligence-gathering function is especially critical in prosecuting the current conflict. As the September 11 attacks starkly illustrate, the enemy is composed of combatants who operate in secret and aim to launch surprise, sporadic, and large-scale attacks against the civilian population. The military estimates that intelligence collected from combatants seized in the current conflict has helped to thwart numerous potential attacks against the United States and its interests. See J.A. 82 (Jacoby Decl.). And in this case, the President determined not only that Padilla's detention as an enemy combatant is "necessary to prevent him from aiding al Qaeda in its efforts to attack the United States," but also that Padilla "possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces,

other governmental personnel, or citizens." App., *infra*, 5a-6a; see J.A. 84.

B. The Military's Authority To Detain Enemy Combatants Is Fully Applicable In The Circumstances Of This Case

1. The settled authority of the military to capture and detain enemy combatants fully applies to a combatant who is an American citizen and is seized within the borders of the United States. In *Quirin*, *supra*, this Court upheld the President's exercise of military jurisdiction over a group of German combatants who were seized in the United States before carrying out plans to sabotage domestic war facilities during World War II. Each of the eight saboteurs had lived in the United States at some point, and one was assumed to be an American citizen. 317 U.S. at 20. All of them affiliated with the enemy's forces and underwent training in Germany on the use of explosives. See *id.* at 21. They came ashore in the United States in two groups, the first arriving on June 13, 1942, and the second four days later. *Ibid.* They then proceeded in civilian clothing to various points, but were seized within days in Chicago and New York by FBI agents. *Ibid.* On July 2, 1942, the President, in his capacity as Commander in Chief, appointed a military commission to try the combatants for violating the laws of war, whereupon the FBI transferred custody over them to the military. *Id.* at 22-23.

The saboteurs sought habeas relief in this Court, contending that the President lacked authority under the Constitution and federal law to subject them to military detention and trial by commission, and that they were entitled to be detained as civilians and tried in the civilian courts. 317 U.S. at 24. The Court denied the saboteurs' claims. Of particular significance, the Court rejected their reliance on *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), which had held that the military lacked authority to subject to trial by

military commission a citizen who was alleged to have "conspired with bad men" (*id.* at 131) against the United States during the Civil War. The *Quirin* Court found *Milligan* "inapplicable" to the circumstances before it, explaining that Milligan, "not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war." 317 U.S. at 45. By contrast, because the *Quirin* saboteurs not only conspired to harm the United States but did so as persons associated with the enemy's forces, they were enemy combatants subject to military jurisdiction under the laws and customs of war. *Id.* at 45-46; see *id.* at 30-31, 35-38.

2. The Court's opinion in *Quirin* confirms the military's authority to detain Padilla as an enemy combatant. First, the Court held that the authority to detain an enemy combatant is undiminished by the individual's American citizenship. As the Court explained, "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." 317 U.S. at 37. Rather, "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of * * * the law of war." *Id.* at 37-38; accord *Colepaugh*, 235 F.2d at 432; *Territo*, 156 F.2d at 142-143. Padilla fits squarely within the Court's language: the President determined that Padilla is "closely associated with al Qaeda," that he has "engaged in * * * hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States," and that his detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." App., *infra*, 5a-6a.

In addition, the *Quirin* Court specifically rejected the suggestion that the saboteurs were "any the less belligerents if, as they argue, they have not actually * * * entered the theatre or zone of active military operations." 317 U.S. at 38.

There thus is no merit to respondent's submission (Br. in Opp. 16) that "there is a profound difference between" the circumstances of this case and the "historical practice of detention of prisoners of war on the field of battle." Respondent likewise errs in attaching significance to the fact that Padilla was "not engaged in imminent hostilities" at the moment of his initial seizure. *Id.* at 18. The *Quirin* Court found it immaterial that the combatants in that case had not "committed or attempted to commit any act of depredation" when they were captured. 317 U.S. at 38. Nor is it significant (see Br. in Opp. 18) that Padilla was initially seized and detained by civilian authorities before his transfer to military control. The combatants in *Quirin* similarly were seized by the FBI and detained by civilian authorities before the President ordered their transfer to military custody. 317 U.S. at 21-23.

Indeed, the factual parallels between *Quirin* and this case are striking. The *Quirin* combatants affiliated with German forces during World War II, received explosives training in Germany, entered the United States with plans to destroy certain of the United States' war facilities, and were seized by FBI agents in Chicago and New York. Padilla was in Afghanistan and Pakistan after the attacks of September 11, he engaged there in extended discussions with senior al Qaeda operatives about conducting terrorist operations in the United States, he researched explosive devices at an al Qaeda safehouse and received training on wiring explosives, he returned to the United States to advance the conduct of further al Qaeda attacks, and he was seized by law enforcement agents in Chicago. Pet. App. 169a-171a. The Court's conclusion in *Quirin* that the saboteurs were enemy combatants subject to military detention and jurisdiction thus is equally applicable in this case.

3. The court of appeals reasoned that *Quirin* "rested on express congressional authorization" that is absent here. Pet. App. 37a. The President's actions in this case, however,

are fully supported by Congress. See Section II.C., *infra*. Moreover, the provisions of the Articles of War discussed in *Quirin* and relied on by the court of appeals as a basis to distinguish *Quirin* in fact remain in effect today. *Quirin* focused on Article 15 of the Articles of War that were then in effect, which recognized the scope of the President's authority as Commander in Chief and provided for trial by military commission of offenses against the laws of war. See 317 U.S. at 28. The same provision is currently codified as Article 21 of the Uniform Code of Military Justice, 10 U.S.C. 821.

While the *Quirin* saboteurs were tried by commission pursuant to that provision, whereas no such charges have been brought against Padilla, the issue in *Quirin* was not merely whether the military had jurisdiction to try the saboteurs for violating the laws of war, but whether the military had authority to detain them in the first place. Accordingly, the Court framed the question in the case as whether "the *detention* and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—* * * are in conflict with the Constitution or laws of Congress." 317 U.S. at 25 (emphasis added); see *id.* at 18-19 ("question for decision is whether the detention of petitioners * * * for trial by Military Commission * * * is in conformity to the laws and Constitution of the United States").

The Court's opinion in *Quirin* likewise makes clear that the military's authority to try an enemy combatant for violating the laws of war necessarily includes the lesser authority to detain him in the course of the conflict. The Court explained that all enemy combatants "are subject to capture and detention * * * by opposing military forces," but that unlawful combatants are "*in addition* subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 31 (emphasis added); see *Colepaugh*, 235 F.2d at 432. The Commander in Chief thus retains "the option to detain until the cessation of hostilities

* * * in either case," *Hamdi*, 316 F.3d at 469, and the overwhelming share of combatants detained in the course of a conflict are never charged with violations of the laws of war, see *id.* at 465. The President's authority to detain Padilla as an enemy combatant therefore follows "*a fortiori* from *Quirin*." Pet. App. 133a.[13]

C. The President's Exercise Of Commander-In-Chief Authority In This Case Comes With The Broad Support Of Congress

Quirin settles that the Constitution raises no absolute prohibition against the detention of an American citizen as an enemy combatant in the circumstances of this case. The court of appeals did not suggest otherwise. The court instead concluded that Congress alone possesses power to authorize the detention as an enemy combatant of a citizen seized on United States soil, and that Congress has not done so here, and indeed, has precluded it.

The court reasoned, in particular, that: (i) the President lacks independent authority as Commander in Chief to detain a United States citizen seized within the borders of the United States; (ii) Congress's Authorization of Force does not supply the requisite statutory predicate for the President's order in this case; and (iii) the provisions of 18 U.S.C. 4001(a) reflect Congress's determination that the detention of an American citizen as an enemy combatant is unlawful absent specific statutory authorization. The court's analysis is deeply flawed at every turn.

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[13] Respondent, like the court of appeals, would distinguish *Quirin* on the ground that the combatants in that case did not dispute their affiliation with the German forces. See Br. in Opp. 17; Pet. App. 39a. But the court of appeals in this case concluded that the President lacked authority to detain Padilla even *assuming* that, as the President's determination and the Mobbs Declaration elaborate, Padilla is closely associated with al Qaeda and trained with al Qaeda forces and then came to the United States intending to advance the conduct of further hostile actions by al Qaeda. The context in which this case comes to the Court thus precisely parallels the undisputed facts in *Quirin*.

1. *The President's Commander-in-Chief power squarely applies in the circumstances of this case*

Because the President's actions in this case are fully supported by Congress, the court of appeals' extended discussion of the President's independent powers as Commander in Chief (Pet. App. 29a-43a) is largely beside the point. But the Court seriously misconstrued the nature of the President's constitutional authority.

The Commander-in-Chief Clause grants the President authority to defend the Nation when it is attacked and to determine the appropriate military response. The President's exercise of that core Article II power is not conditioned on any action by Congress. Rather, "[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He * * * is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). An essential aspect of the President's authority in that regard is determining the character of the military measures to be applied: "He must determine what degree of force the crisis demands." *Id.* at 670 (internal quotation marks omitted); see *id.* at 669-670.In short, "the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected." *Campbell* v. *Clinton*, 203 F.3d 19, 27 (D.C. Cir.) (Silberman, J., concurring), cert. denied, 531 U.S. 815 (2000); see *Eisentrager*, 339 U.S. at 789; *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827).

The court of appeals nonetheless held that the President lacks any inherent power to decide whether Padilla should be seized and detained as an enemy combatant, reasoning that the Commander-in-Chief authority is strictly confined in the "domestic sphere." Pet. App. 32a. The court rested its conclusion in large part (*id.* at 28a, 32a, 36a) on *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). There,

President Truman ordered the Secretary of Commerce to seize and assume control over the Nation's steel mills based on concerns that a work stoppage could jeopardize the production of war materials for the Korean War. See *id.* at 582-583. The government acknowledged that the President had acted without support from Congress, *id.* at 586, and argued that the President's authority "should be implied from the aggregate of his powers under the Constitution," *id.* at 587, including in part the Commander-in-Chief power because of the potential implications for the availability of war materials. This Court disagreed. With respect to the government's reliance on the Commander-in-Chief authority, the Court found that the President lacked independent "power as such to take possession of private property in order to keep labor disputes from stopping production." *Ibid.* The Court deemed that a job for "lawmakers, not * * * military authorities." *Ibid.*

This case involves a decidedly different question. President Truman's order to seize the steel mills was not addressed to the military. The order instead called for action in the *civilian* sector in the form of a directive to the Secretary of *Commerce* to assume control over private industry. In sharp contrast, an order directed to the military to detain an individual as an enemy combatant is a quintessentially *military* measure concerning the military's actions towards the enemy's forces. And the military's actions vis-a-vis the enemy's forces lie at the core of the Commander-in-Chief authority. See *Quirin*, 317 U.S. at 28-29 ("An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."); *Hirota* v. *MacArthur*, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on

which the President as Commander-in-Chief * * * had the final say."). Because the authority to detain enemy combatants is part and parcel of the conduct of war, the logic of the decision below would hamstring the President's authority to respond to attacks on United States soil or to take action to deter such attacks.

The court of appeals' attempt to cabin the Commander-in-Chief authority to the conduct of combat operations on a traditional battlefield (Pet. App. 32a) is particularly ill-considered in the context of the current conflict. The President's power as Commander in Chief "is vastly greater than that of troop commander. He * * * has full power to repel and defeat the enemy; * * * and to punish those enemies who violated the law of war." *Hirota*, 338 U.S. at 208 (Douglas, J., concurring). The "full power to repel and defeat the enemy," contrary to the court of appeals' suggestion (Pet. App. 27a), is not confined to a "foreign battlefield." See *United States* v. *McDonald*, 265 F. 754, 764 (E.D.N.Y. 1920), appeal dismissed, 256 U.S. 705 (1921) ("With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations."). The September 11 attacks not only struck targets on United States soil; they also were launched from inside the Nation's borders. The "full power to repel and defeat the enemy" thus necessarily embraces determining what measures to take against enemy combatants found within the United States.

As the September 11 attacks make manifestly clear, moreover, al Qaeda eschews conventional battlefield combat, yet inflicts damage that, if anything, is more devastating. Al Qaeda combatants assimilate into the civilian population and plot to launch large-scale attacks against civilian targets far from any traditional battlefield. Confining the President's authority to traditional combat zones thus would substantially impair the ability of the Commander in Chief to engage and defeat the enemy's forces. The President's authority

under Article II should not "be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times," but should be given the "scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism." *Youngstown Sheet*, 343 U.S. at 640 (Jackson, J., concurring). The Commander in Chief therefore has authority to seize and detain enemy combatants wherever found, including within the borders of the United States.

2. The President's actions in this case are fully supported by Congress's Authorization for Use of Military Force

Although the President's decision to detain Padilla as an enemy combatant falls squarely within his Commander-in-Chief power, that question is not directly at issue here in light of Congress's specific authorization of military force against the forces responsible for the September 11 attacks. Congress's Authorization of Force supplies an ample statutory basis for the President's decision to seize and detain Padilla as an enemy combatant. Because "the President act[ed] pursuant to an express or implied authorization from Congress," his power is at its maximum, and its exercise is "supported by the strongest of presumptions." *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet*, 343 U.S. at 635 (Jackson, J., concurring)); accord *Hamdi*, 316 F.3d at 467.

a. Congress recognized virtually unanimously in its Authorization of Force that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Preamble, 115 Stat. 224.[14] With that explicit recognition of the

[14] The vote in favor of the Authorization of Force was unanimous in the Senate, while only one Congressman cast a vote against the Authorization in the House. See 147 Cong. Rec. H5683, S9421 (daily ed. Sept. 14, 2001).

President's broad constitutional powers as a guidepost, Congress authorized the President "to use *all* necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, * * * in order to prevent *any* future acts of international terrorism against the United States by such nations, organizations or persons." § 2(a), 115 Stat. 224 (emphasis added).

Because seizing and detaining enemy combatants has long been recognized as an essential part of warfare, the authority to use "all necessary and appropriate force * * * to prevent any future acts of international terrorism against the United States" (§ 2(a), 115 Stat. 224) necessarily embraces the capture and detention of enemy combatants. See *Hamdi*, 316 F.3d at 467; cf. *Moyer* v. *Peabody*, 212 U.S. 78, 84-85 (1909) (construing statute granting authority to "repel or suppress" an invasion as necessarily encompassing "the milder measure of seizing the bodies of those * * * consider[ed] to stand in the way of restoring peace").

That conclusion is fortified by the terms of 10 U.S.C. 956(5), which authorize the military to use appropriated funds for "the maintenance, pay, and allowances for prisoners of war" and "other persons in the custody of the [military] whose status is determined by the Secretary to be similar to prisoners of war," as well as "persons detained in the custody of the [military] pursuant to Presidential proclamation." "It is difficult if not impossible to understand how Congress could" authorize the use of funds "for the detention of persons 'similar to prisoners of war' without also authorizing their detention in the first instance." *Hamdi*, 316 F.3d at 467-468.[15]

[15] The court of appeals erred in discounting the relevance of 10 U.S.C. 956(5) based on *Endo*. See Pet. App. 54a. *Endo* found that a "lump appropriation" in World War II for the "overall program" of the War Relocation Authority did not amount to ratification of the particular aspect of

b. The court of appeals determined (Pet. App. 52a) that the Authorization of Force "contains nothing authorizing the detention of American citizens captured on United States soil," even going so far as to conclude (*id.* at 51a) that the Authorization "contains no language authorizing detention." That reading is insupportable.

The court's conclusion that the Authorization of Force fails to authorize detentions under any circumstances strains credulity. The detention of enemy combatants is an inherent part of warfare and thus is necessarily encompassed by the authorization to use "all necessary and appropriate force." § 2(a), 115 Stat. 224; see Pet. App. 70a-71a (Wesley, J., dissenting) ("It would be curious if the [Authorization of Force] authorized the interdiction and shooting of an al Qaeda operative but not the detention of that person.").

There also is no basis for reading the broad language of Congress's Authorization to contain an unstated exception for enemy combatants captured within the United States. Congress recognized the President's authority to "take action to deter and prevent acts of international terrorism against the United States," and Congress specifically noted that it was "necessary and appropriate that the United States exercise its rights * * * to protect United States citizens both *at home* and abroad." Preamble, 115 Stat. 224 (emphasis added). Indeed, Congress was acting in direct

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the Authority's programs involving detention of concededly loyal citizens. See 323 U.S. at 303 n.24. The Court explained that "Congress may support the effort to take care of these evacuees without ratifying every phase of the program," and that "no sums were earmarked for the single phase of the total program which is here involved." *Ibid.* This case, by contrast, does not involve a lump sum appropriation, or even an appropriation at all. Instead, 10 U.S.C. 956(5) grants specific authorization for the military to expend appropriated funds on the detention of persons "similar to prisoners of war" and persons detained "pursuant to Presidential proclamation." 10 U.S.C. 956(5). That statute demonstrates Congress's specific and explicit understanding that the use of military force inherently entails the detention of enemy forces.

response to attacks that took place on United States soil and were initiated by combatants located within the borders of the United States. Congress cannot be assumed to have intended to withhold support for the use of force against forces identically situated to those that perpetrated the September 11 attacks. To the contrary, Congress recognized that the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security," *ibid.*, and the enemy remains committed to launching further attacks within the Nation's borders, see note 1, *supra*.[16]

In addition, nothing in the Authorization of Force suggests that Congress sought to withhold support for the President's use of force against enemy combatants who are American citizens. Congress supported the President's use of force against "organizations" and "persons" that "*he determines*" were responsible for the September 11 attacks "in order to prevent any future acts of international terrorism" by those "organizations or persons." Preamble, 115 Stat. 224 (emphasis added). There is no suggestion of an intention to condition the President's use of force against persons "he determines" are associated with the enemy on a secondary determination of a person's citizenship. Indeed, whereas Congress broadly authorized the use of force against "persons" and "organizations," Congress specifically used the narrower term "citizen" elsewhere in the Authorization, recognizing that "acts of treacherous violence were committed against the United States and its citizens" on September 11 and that it is necessary to "protect United States citizens

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[16] The debates in Congress reflect the understanding that the President may be required to take action against the enemy within the Nation's borders. See 147 Cong. Rec. H5660 (daily ed. Sept. 14, 2001) ("This will be a battle unlike any other, fought with new tools and methods; fought with intelligence and brute force, rooting out the enemies among us and those outside our borders.") (remarks of Rep. Menendez); *id.* at H5669 ("We are facing a different kind of war requiring a different kind of response. We will need more vigilance at home and more cooperation abroad.") (remarks of Rep. Velasquez).

both at home and abroad." *Ibid.* Moreover, the "well-settled presumption [is] that Congress understands the state of existing law when it legislates," *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988), and *Quirin* established long ago that the military's authority to seize and detain enemy combatants fully applies to a United States citizen, including a citizen seized within the Nation's borders.

The court of appeals evidently would require Congress to have legislated to a level of detail so as specifically to have addressed the use of force against those enemy combatants who happen to be American citizens and are found within the United States. But Congress understandably saw the need to move expeditiously to express its support of the President within days of September 11; and even in less pressing circumstances, "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act." *Dames & Moore*, 453 U.S. at 678. That is particularly true in the present context: "Such failure of Congress * * * does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Ibid.* (quoting *Haig* v. *Agee*, 453 U.S. 280, 291 (1981)).[17]

[17] The court of appeals relied (Pet. App. 52a) on this Court's statement in *Endo* that, "[w]e must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." 323 U.S. at 300. That observation has no application here. A conclusion that the Authorization of Force embraces the detention of enemy combatants does not require "implying" a power to impose a "greater restraint" than is authorized by the statute's "clear" and "unmistakable" terms. The Authorization broadly supports the use of "all necessary and appropriate force," § 2a, 115 Stat. 224, and the authority to detain enemy combatants therefore is necessarily encompassed by its *explicit* terms. Moreover, as Judge Wesley observed, the power to detain enemy combatants, while part and parcel of the use of force and thus expressly authorized by Congress, is a far lesser "restraint" than the authority to shoot them, which the Authorization also grants.

c. Even if there were any doubt on the scope of Congress's Authorization of Force, the President specifically found that his actions in this case were "consistent with" the Authorization. App., *infra*, 5a. There is no warrant for second-guessing the President's judgment in that regard. The court of appeals approached the issue of whether the President's actions are supported by Congress's Authorization as if it were confronting an abstract question of statutory interpretation in the first instance. But Congress wrote the Authorization of Force as an affirmative grant of authority to the President, expressly recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," Preamble, 115 Stat. 224, and entrusted the President with broad discretion to "use all necessary and appropriate force against" the forces that "he determines" were responsible for the September 11 attacks "in order to prevent any future acts of international terrorism against the United States by" those forces, § 2(a), 115 Stat. 224.

When Congress grants the President broad discretionary authority in that fashion, particularly in an area in which the President possesses independent constitutional powers, the courts can set aside the President's exercise of his authority as beyond the discretion conferred by Congress only in exceptionally narrow situations, if at all. See *Dames & Moore*, 453 U.S. at 678 ("[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the Pre-

Pet. App. 70a-71a. *Endo* in no way suggests that an authority to detain is lacking in those circumstances. In fact, the Court specifically observed that the "fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking." 323 U.S. at 301. The Court found that a statute with the "single aim" of "protect[ing] the war effort against espionage and sabotage" did not support detention of a "concededly loyal" citizen, explaining that a person "who is loyal by definition [is] not a spy or a saboteur" and that "detention which has no relationship to" the statute's "objective is unauthorized." *Id.* at 300, 302.

sident broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.'") (quoting *Youngstown Sheet*, 343 U.S. at 637 (Jackson, J., concurring)). Cf. *Dalton* v. *Specter*, 511 U.S. 462, 477 (1994) ("Where a statute * * * commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available."). Those considerations are magnified in this case by the traditional reluctance of courts "to intrude upon the authority of the Executive in military and national security affairs." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988). Judged by those principles, there is no question that the President's decision to detain Padilla as an enemy combatant falls comfortably within the broad sweep of Congress's Authorization of Force.[18]

3. *Section 4001(a) does not constrain the military's detention of enemy combatants*

The court of appeals erred in concluding that Congress prohibited Padilla's detention in the provisions of 18 U.S.C. 4001(a). Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. 4001(a). Padilla's detention could not raise any potential issue under that statute, because the Authorization of Force is an "Act of Congress" that authorized the detention. See Section II.C.2, *supra*. In any event, as is made clear by Congress's purpose

[18] Respondent argues (Br. in Opp. 15 n.10, 18) that Padilla lies beyond the reach of the Authorization because Padilla *himself* did not "plan[], authorize[], commit[], or aid[] the terrorist attacks that occurred on September 11, 2001," § 2(a), 115 Stat. 224. That argument is specious. Congress supported the President's use of "all necessary and appropriate force" against, *inter alia*, "organizations" that "he determines planned, authorized, committed, or aided" the September 11 attacks. *Ibid.* Al Qaeda indisputably is such an "organization," and the President determined that Padilla is "closely associated" with al Qaeda and has engaged in "hostile and war-like acts," App., *infra*, 5a, bringing Padilla squarely within the sweep of the Authorization. See Pet. App. 68a-70a (Wesley, J., dissenting).

in enacting Section 4001(a), by the nature of the statute it repealed, and by the terms of its neighboring provisions, Section 4001(a) pertains solely to the detention of American citizens by *civilian* authorities. It has no bearing on the settled authority of the *military* to detain enemy combatants in a time of war.

a. Congress enacted Section 4001(a) in 1971. Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347. The explicit purpose was to repeal the Emergency Detention Act of 1950, former 50 U.S.C. 811-826 (1970). See 85 Stat. 348. Under the Emergency Detention Act, if the President declared an "Internal Security Emergency" due to an invasion, insurrection, or declaration of war, the Attorney General was authorized to detain persons for whom there were reasonable grounds to believe that they would engage in acts of espionage or sabotage. 50 U.S.C. 812(a), 813(a) (1970). Although the authority under the Emergency Detention Act had never been invoked, Congress sought to eliminate concerns that the Act could become "an instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views." H.R. Rep. No. 116, 92d Cong., 1st Sess. 2 (1971). In addition, Congress was particularly concerned with avoiding a recurrence of the World War II program of detention camps for Japanese-American citizens. See *ibid.*; Pet. App. 47a.

In the court of appeals' view, because the Emergency Detention Act authorized the detention of suspected spies and saboteurs in times of invasion or war, and because the World War II detentions of Japanese-American citizens likewise constituted war-related measures aimed to curb espionage and sabotage, Section 4001(a) was intended to "limit[] military as well as civilian detentions." Pet. App. 47a. That is incorrect. Section 4001(a) "must be understood against the backdrop of what Congress was attempting to accomplish in enacting" it. *Reves* v. *Ernst & Young*, 494 U.S. 56, 63 (1990). And both the Emergency Detention Act and the World War II detentions of Japanese-Americans involved detention by

civilian authorities, not detention by the military under the laws of war. There is no indication that Section 4001(a) was intended to apply outside the context of civilian detentions.

The Emergency Detention Act assigned the detention authority to a civilian official, the Attorney General. See 50 U.S.C. 813 (1970). Moreover, the procedures for detentions under the Act—such as the requirement to obtain a warrant based upon probable cause and the provisions for administrative and judicial review—are characteristic of civilian detentions and did not involve the laws of war. See 50 U.S.C. 814, 819, 821 (1970).

The detention of Japanese-American citizens in World War II likewise was administered by civilian authority. As this Court explained in *Ex Parte Endo*, those detentions were conducted "by a civilian agency, the War Relocation Authority, *not by the military*." 323 U.S. 283, 298 (1944) (emphasis added).[19] In fact, the Court explicitly distinguished the circumstances in *Quirin*, observing that it was not confronting "a question such as was presented in * * * *Quirin*" concerning "the jurisdiction of military tribunals to try persons according to the law of war." *Id.* at 297. Because the case before it involved civilian rather than military detentions, the Court explained, "no questions of military law are involved." *Id.* at 298. Consistent with *Endo*, Congress recognized when enacting Section 4001(a) that the detention of Japanese-American citizens in World War II involved the exercise of civilian authority rather than military authority. See H.R. Rep. No. 1599, 91st Cong., 2d Sess. 7 (1970) ("It appears that the controlling impetus for taking such action was not in fact military, but civilian.").

b. Congress's focus at the time of enacting Section 4001(a) was limited exclusively to civilian detentions. By

[19] The War Relocation Authority was established within the Office for Emergency Management of the Executive Office of the President and was later transferred to the Department of the Interior. See *Endo*, 323 U.S. at 287, 290 n.4.

that time, *Quirin* had long settled that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." 317 U.S. at 37; see *Colepaugh*, 235 F.2d at 432; *Territo*, 156 F.2d at 142. While the legislative materials are replete with confirmation of Congress's intent to address civilian detention camps, like the ones instituted for Japanese-Americans in World War II, they do not address *Quirin* (or *Territo* or *Colepaugh*) or the military's established authority to seize and detain enemy combatants who are American citizens. If Congress had intended for Section 4001(a) to "override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit." *Hamdi*, 316 F.3d at 468.[20]

Congress reconfirmed its intention to speak solely to civilian detentions when it chose to place Section 4001(a) within Title 18, which concerns "Crimes and Criminal Procedure," and elected to add Section 4001(a) to a provision addressed to the control of the Attorney General over federal prisons. See 85 Stat. 347. Before the addition of Section 4001(a), 18 U.S.C. 4001 (1970) consisted of two paragraphs that are now renumbered as Sections 4001(b)(1) and (b)(2). *Ibid.* The terms of those provisions, which remain unchanged, stated then (as now) that the "control and management of Federal penal and correctional institutions, *except military or naval institutions*, shall be vested in the Attorney General." 18 U.S.C. 4001(b)(1) (emphasis added).

Section 4001 "should not be read as a series of unrelated and isolated provisions." *Gustafson* v. *Alloyd Co.*, 513 U.S.

[20] It was so clear that military detentions lay beyond Congress's consideration that, when the Department of Defense was asked to submit its views on various initial proposals for repealing the Emergency Detention Act, the Department elected not to comment, explaining: "Inasmuch as the Act is administered by the Attorney General, this Department defers to the Department of Justice as to the merits of the bills." H.R. Rep. No. 1599, *supra*, at 26.

561, 570 (1995). The most natural conclusion from Congress's decision to add Section 4001(a) to a provision addressing the Attorney General's control over federal prisons—and specifically excluding military institutions—is that Section 4001(a) likewise is directed solely to civilian detentions and has no bearing on the military detention of enemy combatants under the laws of war. A contrary conclusion "simply is not tenable in light of the * * * surrounding provisions." *Gade* v. *National Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 99 (1992).

c. The court of appeals deemed dispositive that the words of Section 4001(a), standing alone and without regard to the language of the neighboring provisions, contain no exception for detentions by the military under the laws of war. Pet. App. 43a-44a. But as this Court has reminded, "[l]ooking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 455 (1989). The court of appeals' reading of Section 4001(a) not only fails to square with Congress's intentions, but it also is "difficult to fathom." *Ibid.* Under the court of appeals' interpretation, Section 4001(a) would preclude the military's detention even of an American citizen seized while fighting for the enemy in the heat of traditional battlefield combat. Congress cannot be assumed to have intended that remarkable result. See *Hamdi*, 316 F.3d at 468.[21]

The court of appeals' construction would raise serious constitutional questions concerning whether Congress can constrain the basic power of the Commander in Chief to seize and detain enemy combatants in wartime. The canon of constitutional avoidance applies with added force when the "constitutional issues * * * concern the relative powers of coordinate branches of government." *Public Citizen*, 491 U.S. at 467; see *American Foreign Serv. Ass'n* v. *Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam). With particular respect to the Commander-in-Chief power, moreover, *Quirin* instructs that a "detention * * * ordered by the President in the declared exercise of his powers as Commander in Chief" is "not to be set aside by the courts without the *clear conviction* that [it is] in conflict with the * * * laws of Congress." 317 U.S. at 25 (emphasis added).

The substantial constitutional doubts raised by a construction of Section 4001(a) that would limit the President's authority as Commander in Chief to detain enemy combatants can be avoided in either of two ways. First, Congress's Authorization of Force can be construed consistent with its plain terms and the well-established principle that the authority to detain enemy combatants is part and parcel of the use of military force, thus supplying whatever statutory authority Section 4001(a) may require. Second, Section 4001(a) can be construed, consistent with its evident purpose, structure, and location in the Code, to limit detentions by civilian authorities but not to limit the authority of the military. The court below eschewed both of those saving constructions, adopting instead an unduly narrow construction of the Authorization and an unduly broad construction of Section 4001(a). That was error.

* * * * *

Because Section 4001(a) does not pertain to Padilla's detention as an enemy combatant, because Congress in any event broadly supported the President's actions through its Authorization of Force, and because the President has authority as Commander in Chief to protect the Nation against enemy combatants who infiltrate the borders of the United States, Padilla's detention is lawful.

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[21] This Court observed in a footnote in *Howe* v. *Smith*, 452 U.S. 473, 479 n.3 (1981), that Section 4001(a) "proscrib[es] detention *of any kind* by the United States" absent statutory authorization. But *Howe* involved civilian detentions, and the Court had no occasion to consider whether Section 4001(a) should be construed to apply to the very distinct context of the military's detention of enemy combatants.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded with instructions that the amended petition be dismissed for lack of jurisdiction. In the alternative, the judgment should be vacated and the case should be remanded for further proceedings consistent with the Court's opinion.

Respectfully submitted.

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MARCH 2004

APPENDIX A

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force."

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS.—nothing in this resolution supercedes any requirement of the war powers resolution.

APPENDIX B

Section 4001 of Title 18 provides:

Limitation on detention; control of prisons

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

(b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations.

(2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

APPENDIX C

Section 956 of Title 10 provides:

Deserters, prisoners, members absent without leave: expenses and rewards

Funds appropriated to the Department of Defense may be used for the following purposes:

* * * * *

(5) Under such regulations as the Secretary concerned may prescribe, expenses incident to the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of the Army, Navy, or Air Force pursuant to Presidential proclamation.

APPENDIX D

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources,

REDACTED

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant;

(2) Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;

(3) Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;

(4) Mr. Padilla possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on

the United States or its armed forces, other governmental personnel, or citizens;

(5) Mr. Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;

(6) it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant; and

(7) it is REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant.

Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.

(35)

No. 03-1027

Supreme Court, U.S.
FILED
12
APR 12 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONALD RUMSFELD,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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STATEMENT

For almost two years, Jose Padilla – an American citizen born in New York – has been held in solitary confinement in a military prison. He has not been charged with any crime or violation of the law of war. No court or neutral fact-finder has evaluated the evidence supporting his detention. Until recently, Padilla was denied any contact with a lawyer, his family, or non-military personnel.

The United States asks this Court to rule that the military may seize and incarcerate Padilla – and any other citizen the President designates as an "enemy combatant" – in this manner until the unforeseeable end of the "current conflict" with al Qaeda. US Br. 14, 28, 29. It is the Government's position there need only be "some evidence" that a citizen has "associated" with a terrorist organization "bent on hostile acts" for that citizen to be declared an "enemy combatant" and denied virtually all constitutional and civil rights.[1]

Padilla was not captured in combat, nor is he alleged to be a soldier or member of a military organization. On May 8, 2002, Padilla was arrested, pursuant to a warrant, by civilian law enforcement agents as he walked off a commercial flight at O'Hare Airport. Pet. App. 4a, 169a. Padilla was wearing civilian clothing and carrying a valid United States passport. JA69. He had no weapons or explosives. JA70.

Padilla was arrested on the basis of information provided by confidential sources. Pet. App. 168a. The Government admits that the information provided by its sources "may be part of an effort to mislead or confuse U.S. officials" and that one of the sources "recanted some of the information that he had provided." *Id.* at 168a n.1. The Government claims its sources indicate that Padilla conceived a "plan" to build and

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[1] *See* Opening Br. of United States, *Padilla v. Rumsfeld*, No. 03-2235, at 48 (2d Cir. filed July 22, 2003) (defining "some evidence" as "*any* evidence in the record that *could* support the conclusion" that Padilla is an "enemy combatant") (emphasis added); US Br. 6 (describing criteria used to determine "enemy combatant" status).

detonate a "dirty bomb" within the United States, but the Government admits that the supposed plot "was still in the initial planning stages" and "there was no specific time set for the operation to occur." *Id.* at 170a. Deputy Secretary of Defense Paul Wolfowitz stated publicly that "I don't think there was actually a plot beyond some fairly loose talk and his coming in here obviously to plan further deeds." *See* http://usinfo.state.gov/topical/pol/terror/02061103.htm.[2]

Although the Government refers repeatedly to "members" and "leaders" of al Qaeda, Pet. App. 169a-170a, the Government admits its confidential source "stated that he did not believe that Padilla was a 'member' of Al Qaeda." *Id.* at 170a. And an unsealed portion of the Government's grand jury affidavit states that "[Padilla] indicated he was unwilling to become a martyr." JA72.

Padilla's alleged activities, although very preliminary and rudimentary, could violate many federal criminal statutes. He has not been charged, however, with any crime. The Government chose to bring Padilla to New York pursuant to a grand jury warrant issued there, and he was held in maximum security at the Metropolitan Correctional Center (MCC). Pet. App. 4a. The District Court appointed Donna R. Newman to represent Padilla, and Newman filed motions challenging the warrant. *Id.* at 4a-5a. Two days before a hearing on the motions, the President signed an order "To the Secretary of Defense" declaring Padilla an "enemy combatant." *Id.* at 57a-58a. Secretary Rumsfeld then sent military personnel to New York to seize Padilla and move him to the military brig on a base in South Carolina. At the scheduled hearing two days later, Newman filed a habeas corpus petition on Padilla's behalf.

[2] The sealed grand jury affidavit supporting Padilla's original arrest, which was shown to defense counsel, contains a fuller and apparently more candid description by the Government of the allegations made by its sources. Respondent is filing with this brief a letter under S. Ct. R. 32.3 for permission to lodge this affidavit with the Clerk.

JA46 (amended petition). Since June 9, 2002, the military has held Padilla in solitary confinement. Pet. App. 5a. He remains there today.[3]

The District Court ruled that Newman could serve as next friend for Padilla and that, given the unique facts of the case, Secretary Rumsfeld was a proper respondent and subject to suit in New York. *Id.* at 76a. The court held that the President had authority to detain Padilla, but that Padilla was entitled to present facts to rebut the claim he is an "enemy combatant." *Id.* at 166a. The court also ruled that Padilla's need to consult with counsel was "obvious" given that "[h]e is held incommunicado at a military facility" and his right to contest his "combatant" status "will be destroyed utterly if he is not allowed to consult with counsel." *Id.* at 147a-148a, 153a.

The Court of Appeals unanimously affirmed on the threshold issues concerning location of suit. *Id.* at 14a-26a & n.22, 61a n.32. On the merits, the court found no need to address the claim that an undeclared war exists between al Qaeda and the United States, *id.* at 30a, or – given that Padilla was seized by the military from a high security jail – the President's authority to prevent an imminent attack. *Id.* at 42a n.27. The court viewed the case as primarily about the division of power between the Executive and Congress. Emphasizing that it sat only a short distance from where the World Trade Center once stood, the court was "as keenly aware as anyone of the threat al Qaeda poses to our country." *Id.* at 2a.

[3] The military has held Padilla in total isolation as an acknowledged interrogation tactic: "Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla. . . . Providing him access to counsel now . . . would break – probably irreparably – the sense of dependency and trust that the interrogators are attempting to create." JA86 (Jacoby Decl.). While the case was pending in this Court, the Government announced that counsel finally could meet with Padilla in the presence of military officials, but even that grant of access was wholly discretionary and may end at any time. *See* US Cert. Reply Br. 7 n.6.

Nevertheless the court held that the Constitution vests *Congress* with the primary power to authorize domestic detentions, including in times of war; that "clear congressional authorization" is required before the military may imprison an American citizen seized on American soil outside a zone of combat; and that Congress has not provided that authority. *Id.* The court thus ruled that Padilla either must be charged with a crime, held as a material witness, or released. *Id.* at 3a.

Judge Wesley dissented in part, but agreed that jurisdiction was proper in New York and noted that "the real weakness of the government's appeal" was its contention that the President had the authority to make a unilateral determination to detain and continue to hold Padilla, without affording Padilla a "serious opportunity to put the government to its proof by an appropriate standard," assisted by counsel. *Id.* at 74a, 75a.

SUMMARY OF ARGUMENT

The Executive today seeks to validate an unprecedented new system of extrajudicial military imprisonment of citizens. It seeks to do so absent any authorization by Congress defining the permissible scope and duration of such imprisonments, absent any meaningful review by the courts, and absent any charge or trial or procedural protections of any kind. The Government argues that the President and his advisers have considered the situation carefully and the courts should defer, completely, to their determination that Padilla's detention is necessary for national security. But in our constitutional system, it is not enough to trust that our leaders act in good faith, for ours is "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). As this Court wrote in rejecting claims that the rule of law should give way to military necessity during the crisis of the Civil War:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866). Terrorism presents a grave threat. But even – indeed especially – in times of peril, efforts to eviscerate our most basic constitutional safeguards must be rejected.

The Framers of our Constitution carefully divided power among the three branches of government to better preserve liberty. They placed stringent limits on the Executive's powers of detention and took care that the Nation's military power should be limited in scope and subordinated to the will of Congress. This Court has carefully policed the boundaries of military jurisdiction throughout our history, and has made clear that even citizens suspected of plotting to engage in hostile acts in wartime generally cannot constitutionally be subject to military jurisdiction where "the courts are open and their process unobstructed." *Milligan*, 71 U.S. at 121.

A system of domestic military detention for citizens suspected of plotting violent acts would violate the constitutional boundary recognized in *Milligan*. But in any event, it would represent such a dramatic departure from our Nation's constitutional traditions that, at a minimum, it must be authorized by a clear and unequivocal statement by Congress, explicitly delineating the scope of such detentions and the procedures to accompany them. The courts then could review that system to determine if its scope and procedures were consistent with the Constitution. In the absence of a clear statement from Congress authorizing such detentions, it is premature for this Court to pass on their constitutionality.

Indeed, throughout the Nation's history, this Court has required clear congressional authorization for detention of citizens. *See, e.g., Ex parte Endo*, 323 U.S. 283, 300 (1944); *Duncan v. Kahanamoku*, 327 U.S. 304, 315 (1946). This fact

alone renders inapposite this Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), which rested on clear and explicit congressional authorization of trials of enemy soldiers by military commissions – authorization that was separate and distinct from the general authorization to use military force contained in the Declaration of War against Germany. Moreover, Congress has underscored its intent to exercise the full scope of its power over detention by enacting a statute specifying that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). Neither of the statutes relied on by the Government here – the Authorization for Use of Military Force ("AUMF") and 10 U.S.C. § 956(5) – provides the necessary clear authorization for detention.

Because the AUMF does not authorize Padilla's military detention, and § 4001(a) expressly prohibits it, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Neither *Quirin* nor the law and customs of war on which that decision rests give the President the inherent power under the Commander-in-Chief Clause to detain citizens like Padilla as "enemy combatants."

In *Quirin*, the prisoners were given a trial and the opportunity to defend themselves with the assistance of counsel. Contrary to the Government's argument, the power to detain without trial is not *lesser* than the power to put on trial, for detention without trial carries a greater risk of error and abuse. These risks, moreover, are exacerbated in the "war on terror," where the persons the Government alleges to be combatants are indistinguishable from the civilian population.

Moreover, the petitioners in *Quirin* were, upon the conceded facts, soldiers in the German Army. Membership in the "armed forces" of an "enemy government" is a significant

limiting principle for military jurisdiction, and it was critical to *Quirin*'s distinction of *Milligan* – in which military jurisdiction had been held unconstitutional notwithstanding the fact that the petitioner was likewise alleged to have plotted to engage in violent acts in wartime, but in conjunction with a secret paramilitary organization rather than as a soldier in a government army. In light of this Court's reiteration even after *Quirin* that *Milligan* remains "one of the great landmarks in this Court's history," *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plurality), and in light of the Court's caution in *Quirin* that it had "no occasion now to define with meticulous care the ultimate boundaries" of military jurisdiction in the absence of congressional legislation or for individuals differently situated, 317 U.S. at 45-46, the Court should decline the Government's invitation to extend *Quirin* far beyond its facts.

If the Government's position were accepted, it would mean that for the foreseeable future, any citizen, anywhere, at any time, would be subject to indefinite military detention on the unilateral order of the President. That would upset our constitutional system in a way that the legislatively authorized trial by military commission of admitted German soldiers simply did not. Equally important, the expansion of the law of war far beyond its historical boundaries and internal limits would be a fundamentally legislative act, yet is one that our legislature has not undertaken. *See Youngstown*, 343 U.S. at 587 (Jackson, J., concurring) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker").

In addition, the power to detain asserted by the Government is so vast that it cannot, consistent with the Due Process Clause, be based solely on "a determination by the President," Questions Presented, US Br. (I), that the individual is an "enemy combatant." In light of the liberty interest at stake, the risk of error, and traditional principles of habeas corpus jurisdiction, the courts must have authority to determine *de*

novo the "jurisdictional facts" that subject an individual to military rather than civilian jurisdiction. Ordinarily, a deprivation of liberty of the sort at issue here could never be accomplished without at least clear and convincing evidence presented at an adversarial hearing before a neutral fact-finder where the accused is assisted by counsel. Again, however, this Court need not define in the first instance the process by which a citizen may be determined to be an enemy combatant and subject to military detention; that is a legislative act for Congress.

Nor should the Court compound the unchecked executive power asserted in this case by adopting new and technical personal jurisdiction rules for habeas corpus that would allow the Government to funnel cases to the judicial district it desires. The traditional standards applied by the Court of Appeals are flexible enough to take account of practical concerns related to the administration of justice under the unique facts of this case.

ARGUMENT

I. THE PRESIDENT LACKS AUTHORITY TO SUBJECT PADILLA TO MILITARY DETENTION.

A. The President's Claim of Power Must Be Evaluated in Light of Established Limitations on Executive Detention and Military Authority.

Throughout history, rulers have asserted the unilateral authority to imprison without trial those among their citizens deemed to be enemies of the state posing threats to national security. The Framers of our Constitution rejected such power as incompatible with a free and democratic society. Through numerous constitutional provisions, the Framers created structural and procedural protections that constrain the Government's power to deprive citizens of liberty. Similarly wary of the danger that military power could substitute for the rule of law, the Framers subordinated the military to civilian government, ensuring that the Constitution's checks and balances could not be evaded through the backdoor of military

necessity. Throughout the Nation's history, this Court has remained faithful to these constitutional bedrocks by carefully scrutinizing extra-judicial detentions and policing the limits of military jurisdiction. The President's claim of an extraordinary power to subject citizens to military detention must be evaluated in light of these long-standing constitutional boundaries.

1. Executive detention is a core concern of the Constitution, as demonstrated by basic constitutional history and the number of constitutional provisions aimed specifically at this problem. The Constitution's frontline protections against executive detention include the Due Process Clause, the criminal procedure protections of the Bill of Rights, and the structural separation of powers. Ordinarily, these provisions ensure that a citizen can only be deprived of liberty pursuant to a law duly enacted by the *legislature* that defines the precise conduct prohibited; upon a prosecution initiated by the *executive*; following a *judicial* trial by jury at which the defendant is entitled to be represented by counsel and to present evidence in his defense. The President's assertion of the right to define, implement, and review Padilla's detention is fundamentally at odds with the Framers' "central judgment" that "within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). It also violates due process and the procedural safeguards of the Fourth, Fifth, and Sixth Amendments.

The Government claims that this case is extraordinary and outside the normal constitutional framework because the Nation is at war. But the Constitution is no less concerned with executive detention in times of war, and if anything demonstrates the Framers' concern that assertions of national security not be used as justification for unchecked executive power.

The Constitution establishes the primacy of legislative and judicial control over the power of detention even in wartime through the Habeas Suspension Clause. As Justice Jackson

explained: "Aside from the suspension of the privilege of habeas corpus in time of rebellion or invasion," the Framers "made no express provision for exercise of extraordinary power because of a crisis," and "I do not think we rightfully may amend their work." *Youngstown*, 343 U.S. at 649-50 (Jackson, J., concurring); *accord Milligan*, 71 U.S. at 125-26. The Suspension Clause expressly contemplates a "Rebellion or Invasion" in which the "Public Safety may require" detention without trial, and it gives *Congress*, not the President, the power temporarily to suspend the writ, which is tantamount to authorizing extrajudicial executive detention. U.S. Const. art. I, § 9, cl. 2; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *cf. INS v. St. Cyr*, 533 U.S. 289, 298-303 (2001).[4] This allocation of power ensures that even in times of crisis, no one branch has the power to deprive citizens of liberty. *See Youngstown*, 343 U.S. at 652 (Jackson, J., concurring) ("emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them").

Historically, the Great Writ evolved as a tool to limit executive detention – a power that frequently had been abused by the Crown based on claims that such detention was necessary to protect the security of the realm in time of emergency. *See Darnel's Case*, III How. St. Tr. 2, 44-45 (1627); William F. Duker, *A Constitutional History of Habeas Corpus* 141 (1980) (describing how Parliament "refused to accept [the King's] claim to emergency power of arrest and detention," enacting first the Petition of Right and then the acts guaranteeing habeas corpus). The great struggles between the King and Parliament in the 17th Century eventually established that only Parliament could suspend habeas corpus. *See* 1 William Blackstone, Commentaries on the Laws of England

[4] Similarly, the Treason Clause, which contemplates citizens "levying War against" the United States and "adhering to their Enemies," U.S. Const. art. III, § 3, cl. 1, establishes *heightened* requirements for conviction of such crimes before an Article III court.

136 (photo reprint, Univ. of Chi. Press 1979) (1765). These struggles were well known to the Framers and continued into the colonial era. But limits on the King's power were sufficiently established by then that even King George did not claim an executive or military power to detain subjects suspected of treason during the American Revolution. Though the colonists had armed themselves and plotted to expel the Crown with violent acts, the King recognized he could not detain these combatants without charge absent an Act of Parliament suspending habeas corpus, which he sought and received. 17 Geo. 3 c. 9 (1777).

This history negates the notion that the President has broad inherent powers of detention absent legislative authorization. Even in wartime, detention must take place within a framework of positive law enacted by Congress. The Executive's unilateral detention of Padilla is directly contrary to this tradition.

2. The President's assertion of military power over Padilla also runs afoul of our Nation's established limits on military jurisdiction. The Framers had a "fear and mistrust of military power." *Reid*, 354 U.S. at 29 (plurality). This was born of the fact that "the King had endeavored to render the military superior to the civil power." *Duncan*, 327 U.S. at 320; Decl. of Ind. para. 14 (1776).[5] As a result, the Framers made the military "subordinate to civil authority." *Reid*, 354 U.S. at 30. By dividing war powers between Congress and the President, they also sought to ensure that military power would not become a tool of oppression.[6] As set forth by Justice

[5] *See also Loving v. United States*, 517 U.S. 748, 762 (1996) ("The political disorders of the 17th century ushered in periods of harsh military justice, with soldiers and at times civilian rebels punished, even put to death, under the summary decrees of courts-martial") (quotation marks omitted).

[6] The Framers allocated to Congress power to "define and punish . . . Offences against the Law of Nations" (U.S. Const. art. I, § 8, cl. 10); powers over war and the militia, including the power to "declare War . . . and make Rules concerning Captures on Land and Water" (*id.*, art. I, § 8, cl. 11);

Jackson in his seminal concurrence in *Youngstown*, particularly in the domestic sphere, the extent of the President's authority depends on whether he is acting pursuant to, absent, or contrary to congressional authorization. 343 U.S. at 635-38; *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981).

Throughout the Nation's history, this Court has carefully policed the boundaries of military jurisdiction and has struck down incursions of martial law into civilian life. The most important of these cases grew out of the Civil War, when the very existence of our Republic was threatened and large swaths of the country became battlefields. In the context of that grave crisis, the Court nevertheless held that military jurisdiction could not extend to civilians in areas "where the courts are open and their process unobstructed." *Milligan*, 71 U.S. at 121; *see also id.* at 141-42 (Chase, C.J., concurring) (military jurisdiction could not extend to civilians except where martial law had been lawfully imposed); *Duncan*, 327 U.S. at 322. Padilla's case fits squarely within the framework of *Milligan*.

Milligan, like Padilla, was charged with conspiring with a secret society to commit hostile and warlike acts against the United States. Milligan was alleged to have joined and aided a secret paramilitary group for the purpose of overthrowing the government; to have violated the law of war; to have held communications with the enemy; and to have conspired to seize munitions, liberate prisoners of war, and commit other violent acts in an area under constant threat of invasion by the enemy. 71 U.S. at 6-7 (statement of case); *id.* at 140 (Chase, C.J., concurring). Milligan, like Padilla, was seized by the military. As in this case, the Government argued that the President's role as Commander-in-Chief placed all powers in his hand, making

power to "make Rules for the Government and Regulation of the land and naval Forces" (*id.*, art. I, § 8, cl. 14); power "to provide for calling forth the Militia to . . . suppress Insurrections, and repel Invasions" (*id.*, art. I, § 8, cl. 15); and the obligation to prescribe by law the quartering of soldiers in any private home, even in time of war (*id.*, amend. III).

him simultaneously "supreme legislator, supreme judge, and supreme executive." *Id.* at 14 (argument of Attorney General).[7] Unlike Padilla, however, Milligan was charged with crimes and tried before a military commission, before which he was represented by counsel and allowed to present a defense.

Despite Milligan's direct participation in planning attacks on the Nation itself in a time of war, this Court firmly rejected the expansion of military jurisdiction over a civilian American citizen and held that Milligan was entitled to a civilian criminal trial and to release from military custody. The Court in *Milligan* recognized the extreme importance of the question presented – which, as here, "involves the very framework of the government and the fundamental principles of American liberty." *Id.* at 109. It observed that the Constitution itself – notably the Fifth and Sixth Amendments – specifies in plain terms how citizens must be tried. *Id.* at 119-20. And it reaffirmed that "it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law." *Id.* at 119.

The Court held that constitutional requirements could not be circumvented by invoking military necessity or by using the army in place of civil process to detain or punish citizens. It recognized that history had shown "the extent of the struggle to preserve liberty and relieve those in civil life from military trials." *Id.* And it emphasized that the Constitution's requirements and guarantees apply "equally in war and peace" and are not "suspended during any of the great exigencies of government." *Id.* at 120-21. Only one constitutional safeguard could be suspended in wartime: "the one concerning the writ of habeas corpus." *Id.* at 125.[8]

[7] The Government further argued: "As necessity makes [the President's] will the law, he only can define and declare it; and whether or not it is infringed, and of the extent of the infraction, he alone can judge; and his sole order punishes or acquits the alleged offender." *Id.*

[8] "It is essential to the safety of every government that, in a great cri-

The Court recognized that the Constitution allows soldiers and sailors in the armed forces to be tried under military jurisdiction. *Id.* at 123; *accord id.* at 142 (Chase, C.J., concurring); U.S. Const. amend. V; *Solorio v. United States*, 483 U.S. 435, 439 (1987) ("the Constitution [conditions] the proper exercise of court-martial jurisdiction . . . on one factor: the military status of the accused"). But it refused to equate Milligan with a soldier, noting that "he was not engaged in legal acts of hostility against the government, and only such persons, when captured are prisoners of war." 71 U.S. at 131. As the Court explained, "[i]f he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties." *Id.* The analysis applies equally here.

The Court acknowledged that necessity also permits the military to exercise jurisdiction over civilians in conquered territories that are ruled by military government, as well as when martial law is lawfully imposed in the United States itself during war or invasion "within districts or localities where ordinary law no longer adequately secures public safety or private rights." *Id.* at 142 (Chase, C.J., concurring); *see id.* at 126 (opinion of Court). But outside those narrow circumstances, it made clear that "no usage of war could sanction a military trial . . . for any offence whatever of a citizen in civil life, in no wise connected with the military service." *Id.* at 121-22; *accord Smith v. Shaw*, 12 Johns. 257 (N.Y. Sup. Ct. 1815) (court-martial lacked jurisdiction to try citizen civilian).[9]

sis, . . . there should be a power somewhere of suspending the writ of habeas corpus." *Id.* But, "[k]nowing this, [the Framers] limited the suspension to one great right, and left the rest to remain forever inviolable." *Id.* at 126.

[9] The majority in *Milligan* believed that not even Congress could have authorized trials by military commissions in areas where the courts were open and operating. Chief Justice Chase agreed that Milligan should be released, but thought that Congress had the power (though unexercised in that case) to authorize military commissions by imposing martial law. Even the concurring Justices agreed, however, that the power to impose martial law is narrow. *Compare id.* at 121, 123, 127 (opinion of Court), *with id.* at 139-42 (Chase, C.J., concurring). The disagreement in *Milligan* is not relevant here, however, because the military does not purport to be detaining Padilla pursuant to any lawful imposition of general martial law – nor could it. And neither the Court nor Chief Justice Chase intimated that military jurisdiction could be exercised over a civilian citizen in the United States absent martial law.

Throughout its brief, the Government paints the limited military jurisdiction over trials of German soldiers upheld in *Ex parte Quirin* (discussed in detail *infra* at 18-20, 27-36) as the general rule, to which *Milligan* forms a narrow exception. But that framework is exactly backwards. *Quirin* was a narrow decision, explicitly confined to the precise facts before the Court. 317 U.S. at 19-20. Since *Quirin*, this Court has continued to refer to *Milligan* as "one of the great landmarks in this Court's history." *Reid*, 354 U.S. at 30 (plurality). It has reaffirmed the principles of *Milligan* numerous times when the government has claimed that a threat to national security justifies the arrest, detention, or trial of an American citizen by the military. *See Duncan*, 327 U.S. at 324 (rejecting military jurisdiction to try civilians even under statute authorizing martial law); *Reid*, 354 U.S. at 33-34 & n.60 (plurality) (notwithstanding statute, rejecting on constitutional grounds military jurisdiction outside "active hostilities" or "occupied enemy territory," and rejecting argument that "concept 'in the field' should be broadened . . . under the conditions of world tension which exist at the present time"); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955) (rejecting military authority to arrest and try discharged former soldier); *Endo*, 323 U.S. at 299 (rejecting power to detain loyal American citizen of Japanese descent during World War II). As *Reid* noted:

> Throughout history many transgressions by the military have been called "slight" and have been justified as "reasonable" in light of the "uniqueness" of the times. We cannot close our eyes to the fact that today the peoples of many nations are ruled by the military.

354 U.S. at 40 (plurality). But "[w]e should not break faith with this nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution." *Id.* In contrast, the two-year, ongoing military detention of Jose Padilla is fundamentally at odds with that tradition.

B. Congress Has Not Authorized Padilla's Military Detention.

A statute that authorized the military detention of an American citizen based on untested allegations of his "association" with a terrorist group and "loose talk" of future acts of violence would present grave constitutional questions. The Court need not resolve those questions today, however, for there is no such statute. In reviewing deprivations of individual liberty, this Court consistently has required, at a minimum, the clearest authority from Congress. The Court of Appeals correctly found that such authority is lacking in this case.

1. "In traditionally sensitive areas . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (quotation marks omitted); *Greene v. McElroy*, 360 U.S. 474, 507 (1959) ("explicit action [by lawmakers], especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws"). This "clear statement" requirement applies most forcefully in the context of restraints on personal liberty – particularly physical incarceration like that here. "Where the liberties of the citizen are involved . . . we will construe narrowly all delegated powers that curtail or dilute them." *Gutknecht v. United States*, 396 U.S. 295, 306-07 (1970) (citation and quotation marks omitted).

The clear statement rule does not disappear in times of war or emergency; to the contrary, in such times the Court has been especially vigilant. In our early years, the Court held that a

congressional declaration of war does not grant the President authority to confiscate enemy persons or property found domestically, without an additional clear authorization of those seizures by Congress. *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814). Chief Justice Marshall explained that even a "declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found, at the time, within the [domestic] territory." *Id.* at 126; *see also Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804) (Marshall, C.J.) (striking down wartime seizure of ship traveling *from* a French port because congressional statute authorized seizure of ships traveling *to* a French port). The Court reiterated this principle after the Civil War, finding that "[t]he clearest language would be necessary to satisfy us that Congress intended" to grant the military power to determine judicial questions, because "[i]t is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires." *Raymond v. Thomas*, 91 U.S. 712, 715-16 (1875) (ruling that statutes that gave "very large governmental power to the military commanders" during Reconstruction were not sufficient to authorize military to void local court decree).

The Court has adhered to this clear statement requirement in modern wartime cases. In *Endo*, the Court construed a Congressional enactment and prior Executive Order concerning the Japanese-American internment camps of World War II. After reviewing the requirements of the Fifth and Sixth Amendments and the Habeas Suspension Clause and citing *Milligan*, the Court emphasized: "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." 323 U.S. at 300. Because the statute did not use "the language of detention," no authority to detain existed. *Id.*

Two years later, in *Duncan*, the Court applied the same rule in holding that a congressional enactment allowing the Governor of Hawaii to "place the Territory . . . under martial law," 327 U.S. at 307 n.1, must be narrowly construed, because Congress "did not specifically state to what extent the army could be used or what power it could exercise. It certainly did not explicitly declare that the Governor in conjunction with the military could for days, months or years close all the courts and supplant them with military tribunals." *Id.* at 315.

The clear statement rule remains a central tenet of this Court's jurisprudence. *See, e.g., St. Cyr*, 533 U.S. at 298-300; *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) ("Based on our conclusion that indefinite detention of aliens . . . would raise serious constitutional concerns, we construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review"). Given the substantial constitutional questions presented in this case by the indefinite military imprisonment of an American citizen, without trial or adversarial process of any kind, based solely on untested allegations of "association" with a terrorist group and "loose talk" suggesting potential future criminal acts, a clear statement of congressional authority is, at a minimum, required.

2. *Quirin*, the case on which the Government chiefly relies, held that "Congress ha[d] *explicitly provided*, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war." 317 U.S. at 28 (emphasis added); *cf. Madsen v. Kinsella*, 343 U.S. 341, 355 n.22 (1952) ("[T]he military commission's conviction of [the *Quirin*] saboteurs . . . was upheld on charges of violating the law of war *as defined by statute*") (emphasis added); *In re Yamashita*, 327 U.S. 1, 7 (1946) (*Quirin* military commission upheld on basis of Congress's power under Offenses Clause of Article I). Thus, the Court in *Quirin* rested military jurisdiction to try offenses against the law of war on Congress's highly specific statutory authorization of such trials

in the Articles of War – not on the Declaration of War by the United States against Germany.[10] In short, the clear statement rule was satisfied in *Quirin*.

The Government correctly notes that the Articles of War relied on in *Quirin* remain in force today. *See* 10 U.S.C. §§ 801-941 (Uniform Code of Military Justice). But while those statutes may provide a clear statement authorizing "the *trial* and punishment of offenses against the law of war," *Quirin*, 317 U.S. at 27 (emphasis added), they cannot plausibly be read to provide a clear statement authorizing the indefinite and potentially permanent military detention of an American citizen *without trial*. *See, e.g.*, 10 U.S.C. § 821 (referring to "offenders or offenses that by statute or by the law of war may be *tried* by military commissions") (emphasis added); *see also* Louis Fisher, Congressional Research Service, *Military Tribunals: The Quirin Precedent* 6 (2002) ("CRS Report") (describing role of *Quirin* counsel); *Yamashita*, 327 U.S. at 5 (six officer-lawyers appointed as defense counsel in military trial of Japanese general "demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged").

Detention without charge poses far greater risks of error and abuse than trials do. And those risks become even sharper in the "war on terror," where suspected saboteurs cannot readily be distinguished from the general civilian population. *Infra* at 33-36. Indefinite detention – especially in solitary confinement, incommunicado, and subject to coercive interrogation – plainly raises unique constitutional problems not presented by the adversarial trial of defendants represented by counsel. *Infra*

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[10] That is especially striking, because the Executive's powers are larger when war is formally declared than in an undeclared or limited armed conflict. *See Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) ("If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, . . . but if a partial war is *waged*, its extent and operation depend on our municipal laws") (emphasis added).

at 39-44. The unchecked power to detain claimed and exercised by the Executive here is simply without precedent in our Nation's history, and it has never been sanctioned by this or any other Court. It certainly is not authorized by the Court's passing reference in *Quirin* to the capture and detention of combatants as the necessary prerequisites to the saboteurs' trials that promptly ensued. *See* 317 U.S. at 31.[11]

3. The clear statement rule is buttressed here by the Non-Detention Act, enacted by Congress is 1972. The Act provides: "*No citizen* shall be imprisoned or otherwise detained by the United States *except pursuant to an Act of Congress*." 18 U.S.C. § 4001(a) (emphasis added). Both courts below correctly held that § 4001(a) plainly applies to Padilla's military imprisonment, and that the statute therefore clearly *prohibits* Padilla's detention absent specific authorization from Congress for that detention. Pet. App. 135a-139a, 43a-50a.

In response, the Government contends that § 4001(a) applies only to *civilian*, not *military*, detentions of citizens. US Br. 45-48. But as this Court has recognized, "the plain language of § 4001(a) proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original). The statute cannot be twisted to say that only detentions of citizens by civilian authorities are impermissible (absent authority from Congress), but this prohibition may be avoided if citizens are imprisoned by the military instead. The Government's attempt to rewrite the

[11] Indeed, the only decision we are aware of upholding military detention of an American citizen without trial, *In re Territo*, 156 F.2d 142 (9th Cir. 1946), is distinguishable in multiple ways, including the critical fact that Territo was held to be an *enemy alien* notwithstanding his American citizenship, *id.* at 145, and he was captured on the battlefield in Italy wearing part of an Italian army uniform, *id.* at 143. In addition, Territo was afforded a full habeas corpus hearing in which witnesses were heard and he was assisted by counsel.

statute must be directed to Congress, not this Court.

In light of the statute's plain language, no recourse to extra-textual materials is needed or proper. Nonetheless, the history and purpose of the Act confirm its plain meaning. *See generally* Pet. App. 43a-50a. Section 4001(a) was enacted to repudiate the experience of the notorious Japanese-American internment camps of World War II and to repeal the Emergency Detention Act of 1950 ("EDA"). *See* H.R. Rep. No. 92-116 at 1 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1435-36 ("H. Rep."). Contrary to the Government's astounding claims, those internment camps were not wholly civilian. Although they were *administered* by a civilian agency, they were directly and heavily controlled by military commanders.[12]

Section 4001(a) also repealed the EDA, which likewise was directed toward the detention of persons believed to be a threat to the security of the country, including in times of war. The EDA authorized the President, in time of invasion, declared state of war, or insurrection in aid of a foreign enemy, to proclaim an "Internal Security Emergency" and to apprehend

[12] Ms. Endo "was evacuated from Sacramento, California, in 1942, pursuant to certain *military orders* which we will presently discuss. . . ." 323 U.S. at 284-85 (emphasis added). Those military orders are discussed at length at pages 285 through 290 of the opinion. Among other things, it was a Proclamation of the *Secretary of War* that "provided that all persons of Japanese ancestry in [designated military] areas were required to remain there unless written authorization to leave was obtained from the Secretary of War or the Director of the War Relocation Authority. It recited that the United States was subject to 'espionage and acts of sabotage, *thereby requiring the adoption of military measures* necessary to establish safeguards against such enemy operations emanating from within as well as from without the national boundaries.'" *Id.* at 289 n.3 (emphasis added, citation omitted). Every citizen of Japanese ancestry who was permitted to leave a camp "was said to remain in the 'constructive custody' of the *military* commander in whose jurisdiction the Relocation Center was located." *Id.* at 291 n.9 (emphasis added). The internment detentions can hardly be described as "civilian" merely because the military ordered citizens into camps that were administered by civilian agents.

and detain persons as to whom there was reasonable ground to believe that they "probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." Pub. L. No. 81-831, codified at 50 U.S.C. §§ 812, 813, 64 Stat. 1021 (1950).[13] Section 4001(a) *repealed* the Executive's right to detain such persons. Although those detentions were to have been administered by the Attorney General, there is no indication that Congress would have been satisfied had the same wartime spies and saboteurs covered by the EDA simply been detained instead by military authorities.

Indeed, Congress recognized that "the constitutional validity" of the EDA was "subject to grave challenge." H. Rep. at 5, *reprinted in* 1971 U.S.C.C.A.N. at 1438. As explained in the House Report, the criteria for detention in the statute "would seem to violate the Fifth Amendment by providing imprisonment not as a penalty for the commission of an offense, but on mere suspicion that an offense may occur in the future. The Act permits detention without bail even though no offense has been committed or is charged." *Id.* Moreover, Congress specifically rejected the initial proposal for a simple *repeal* of the EDA, without adding the explicit prohibition of § 4001(a): "Repeal alone might leave citizens subject to arbitrary executive action, *with no clear demarcation of the limits of executive authority*." *Id.* (emphasis added). Ironically, what the Government seeks to uphold with respect to Padilla – imprisonment without charge during an alleged war based upon suspicion that an offense may occur in the future – is precisely what Congress feared could occur under the EDA and enacted § 4001(a) to prevent. Yet the Government claims § 4001(a)

[13] The EDA originally was enacted in response to a legislative finding that a "world Communist movement" was engaged in covert operations within the United States, through operatives in the United States whose mission was to engage in "treachery . . . espionage, sabotage, [and] terrorism." *Id.* §§ 2(1), 2(7), 101(1), 101(6), 64 Stat. 987-88, 1019-20.

and the repeal of the EDA are wholly irrelevant.

4. The Government contends that authority for Padilla's detention is conferred by the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF") (Pet. App. 59a-60a), enacted by Congress following the attacks of September 11, and by an appropriations statute for the Department of Defense, 10 U.S.C. § 956(5). Neither law authorizes the military detention of citizens like Padilla.

a. The AUMF says *nothing* about military detentions of citizens, and it simply cannot be viewed as authority – let alone a "clear statement" of authority – for such an unbounded and extensive curtailment of individual liberties. The AUMF does not mention detention, much less define who is subject to being detained, how the detention decisions shall be made or reviewed, how long such persons may be imprisoned, or what rights they shall have while confined. Basic constitutional rights of trial by jury, civilian over military rule, and judicial review of executive detention cannot simply be eliminated by implication. The President's scheme for detaining citizens indefinitely in military prisons is unprecedented, yet there is no discussion whatsoever in the legislative history of the AUMF of the lawfulness or wisdom of such a system. The obvious explanation for this lack of debate is that Congress did not contemplate or intend to authorize such a scheme.

The Government principally relies on the Preamble of the AUMF, *see* US Br. 2, 15, 38, 40, 41, 43, which states that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Pet. App. 59a. But while the Preamble recognizes that the President *has* authority to deter and prevent acts of terrorism, it does not begin to identify what that authority *is*, much less state that it includes detentions like that here. Under the Government's view, the general language of the Preamble recognized or created executive authority to do *anything* that could be said to "deter and prevent acts of

international terrorism against the United States." The Preamble cannot reasonably be interpreted as conveying such unlimited power to the President, which would present grave constitutional questions.

The Government also relies on § 2(a) of the AUMF, which provides that the President is authorized to use "all necessary and appropriate force" against those nations, organizations, or persons he determines were responsible for the September 11 attacks, "in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Id.* at 60a. This authorization to use "necessary" and "appropriate" force does authorize the President to use military power; indeed, the AUMF itself provides that "this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." Pet. App. 60a; *see* 50 U.S.C. § 1541 *et seq.*[14] But there is nothing in the AUMF to suggest that Congress intended to displace the criminal laws (and protections associated with those laws) with a wholly new, unbounded scheme of preventive military detention by executive fiat. The AUMF simply is not a "clear statement" of congressional intent to curtail the fundamental rights of citizens against military detentions without trial. *See Endo*, 323 U.S. at 300 (finding no authority where statute did not use "the language of detention").[15]

Ultimately, the Government suggests that Congress

[14] The War Powers Resolution requires the President to cease military operations within 60 days unless Congress has declared war or specifically authorized the use of the armed forces. 50 U.S.C. § 1544(b).

[15] By its own admissions, the Government also cannot show that Padilla even falls within its own broad view of the AUMF, because the Government does not claim that Padilla is a "member" of al Qaeda (and certainly has no personal connection to the September 11 attacks). *See* US Br. 44 n.18; Pet. App. 170a. Unless the AUMF authorizes the indefinite military detention of any person who even has "associated" with a "member" or "leader" of al Qaeda, Padilla falls outside the statute.

necessarily authorized detention as a lesser-included power of the power to shoot and kill. US Br. 42 n.17. In certain circumstances, that might be true. Where the military has authority to shoot enemy soldiers, such as on the battlefield in Afghanistan, the military has power to capture and detain those soldiers instead for some period of time. But unless the Government contends it had the right to shoot Padilla where he was seized by the military – in this case, a maximum-security cell at the MCC – there is no subsidiary power to detain him militarily instead, let alone a clearly stated power to do so.

This lack of any clear statement in the AUMF authorizing the detention without charge of suspected citizen-saboteurs renders this case far different from *Quirin*. As noted above, *Quirin* found congressional authorization not in Congress's Declaration of War against Germany (comparable to, but far more solemn than, an "authorization to use military force"), but rather on specific provisions of the statutory Articles of War that clearly established the authority of "military commissions" to conduct "trials" of particular "offenses." 317 U.S. at 26-27.

Congress's subsequent enactments also confirm that the AUMF did not authorize Padilla's detention. Just one month after passing the AUMF, the same Congress passed the Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). Unlike the AUMF, the Patriot Act expressly gave the Executive authority to detain without criminal charge *aliens* suspected of terrorist activity, for short periods of time before the initiation of criminal or removal proceedings.[16] Although there were

[16] The Patriot Act authorizes executive detention of terrorist aliens, but requires the Executive either to put an alien in removal proceedings, charge him with a criminal offense, or release him "not later than 7 days after the commencement of such detention." 8 U.S.C. § 1226a(a)(5). The Attorney General may seek to renew the detention on an immigration violation charge, but that renewal request is subject to judicial oversight, and the detainee has a continuing ability to challenge the detention. *Id.* §§ 1226a(a)(6), 1226a(b).

extensive debates on this topic, there was no discussion of the parallel detention of *American citizens* suspected of terrorist activity.[17] If, as the Government claims, the AUMF had already delegated to the Executive unfettered discretion to detain any suspected terrorist without trial, whether or not a citizen, the Patriot Act's provisions would have been redundant. For it not to be so, one would have to conclude that Congress deliberately enacted § 1226a of the Patriot Act to provide aliens with *more* protections than citizens. This is simply implausible.[18]

b. Similarly, 10 U.S.C. § 965(5) does not authorize the military detention of Padilla. The provision simply authorizes funds to be used for the maintenance of prisoners of war and "similar" persons, but does not authorize detention of any such person, much less expressly and clearly authorize the indefinite detention of an American citizen arrested unarmed in the

[17] *See* Christopher Bryant and Carl Tobias, *Youngstown Revisited*, 29 Hastings Const. L.Q. 373, 386-91 (2002). The Patriot Act also greatly expanded federal criminal prohibitions on terrorism, as requested by the President. *See* Pub. L. No. 107-56, §§ 802, 803, 805, 808, amending 18 U.S.C. §§ 2331, 2339, 2339A, 2339B. These provisions appear specifically to encompass the unlawful acts attributed to Padilla. The Government contends that, instead of utilizing these provisions, the President simply may detain without trial anyone he suspects may have planned or committed a terrorist act within the United States.

[18] As a result, this case is markedly different from *Dames & Moore*, on which the Government relies. In that case, the Court reviewed the long history of executive settlement of claims against foreign sovereigns, 453 U.S. at 679-84, which stands in marked contrast to the unprecedented detention here. Against that background, the Court found presidential authority to suspend claims based on other statutes that clearly indicated that Congress approved the settlement authority at issue, and on the absence of any contrary indication of legislative intent. *Id.* at 678-86. Here, the Government points to no other legislation indicating congressional approval of executive detentions, and both the Patriot Act and § 4001(a) strongly indicate that Congress did *not* intend to allow indefinite military imprisonments of citizens without trial.

United States.[19] In *Endo*, the Court rejected an argument virtually identical to that made by the Government here. 323 U.S. at 303 n.24 ("the appropriation must plainly show a purpose to bestow the precise authority which is claimed," which cannot be deduced from "a lump appropriation").

In sum, the statutes on which the Government relies in this case, unlike those in *Quirin*, provide no clear statement authorizing the Executive's action. To the contrary, Congress expressly prohibited this detention through § 4001(a).

C. The President Lacks Authority to Detain Padilla for the Additional Reason that He Is a Civilian Citizen Not Subject to Military Jurisdiction.

Even if the President possessed some authority to order the military to arrest and detain suspected "combatants," that authority would not permit the exercise of military jurisdiction over Padilla, because he does not fit into any traditional or recognized category of "combatant" subject to military instead of civilian authority. In arguing to the contrary, the Government again relies exclusively on *Quirin*. But *Quirin* involved clear congressional authorization of the precise executive action taken – the opposite of the clear *prohibition* here. In addition to that dispositive distinction, the ambit of the military *jurisdiction* permitted in *Quirin* – whether to try and punish through a military commission, or even if to detain without trial – does not extend to this case.[20]

[19] Nor does § 965(5) amend substantive law. *See, e.g., Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992).

[20] Significantly, the Government itself does not define consistently what it means by "enemy combatant." In this case, it defines the "legal standard" for "enemy combatant status" as follows: "'Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war.'" US Br. 6 (quoting *Quirin*, 317 U.S. at 37-38 (ellipses inserted by Government)). In its Brief in *Hamdi v. Rumsfeld*, No. 03-6696 (U.S. filed Mar. 30, 2004), however, the Government defines "enemy combatant" quite differently: "When an

1. This Court has never sanctioned military jurisdiction over an individual who was not a soldier in a recognized army or found in an area of active combat or under military occupation or martial law. *Quirin* respected these traditional boundaries on military jurisdiction recognized in *Milligan* and adhered to in cases like *Duncan*, *Toth*, and *Reid* – boundaries the Government transgresses here. As described *supra* at 12-14, *Milligan* held unconstitutional the exercise of military jurisdiction over an individual accused of plotting to engage in hostile and warlike acts with a secret militia group, "holding communication with the enemy," and "affording aid and comfort to rebels against the authority of the United States." 71 U.S. at 6-7. Milligan was not an actual member of the Confederate army and therefore remained a civilian under civilian jurisdiction - not an "enemy combatant" subject to military jurisdiction.

Quirin, by contrast, involved admitted soldiers in a foreign army. Each of the defendants was conceded to be a member of the German Army and wore a German uniform when landing with explosives in the United States. 317 U.S. at 21. In short, "the petitioners in *Quirin* admitted that they were soldiers in the armed forces of a nation against whom the United States had formally declared war." Pet. App. 39a. In contrast, the Government merely alleges that Padilla is "associated" with, but is not believed to be a "member" of, al Qaeda. *Id.* at 169a, 170a.

That is a critical distinction (even assuming for the sake of argument that al Qaeda could be viewed as an enemy army, *but see infra*, at 33-36). The difference between a citizen who merely aids an enemy army and one who is a member of that

individual is captured, commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant, *i.e.*, whether the individual 'was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States.' Individuals who are not enemy combatants are released." *Id.* at 3 (citation to DoD fact sheet omitted).

army distinguished *Milligan* from *Quirin* – a fundamental distinction that has long been recognized in the law of war. Outside of zones subject to actual martial law or military government, the law of war provides for military jurisdiction only over members of our own armed forces or over "[i]ndividuals of the *enemy's army*." William Winthrop, *Military Law & Precedents* 838 (2d ed. 1988) (emphasis added); *accord Quirin*, 317 U.S. at 30. That fundamental distinction between soldiers and civilians informs *Quirin*'s every reference to "combatants" or "belligerents" and its further distinction between "lawful and unlawful combatants," all of which refer to members of the armed forces.[21] Indeed, the historical instances of military jurisdiction cited by *Quirin* concerned members of enemy armed forces in the ordinary meaning of that term: officers and soldiers.[22]

[21] *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) at art. 43(2) ("Protocol I Additional") ("Members of the armed forces of a Party to a conflict . . . are combatants"); Jennifer K. Elsea, *Presidential Authority to Detain "Enemy Combatants,"* 33 Presidential Studies Q. 568, 570 (Sept. 2003). Combatant is a dual use term under the law of war, defining not only who may be detained as a POW but also who may be shot. Under the law of war, those who are not members of the armed forces of a Party (a sovereign nation) to a conflict cannot be treated as combatants, that is as targets for military attack, "unless and for such time as they take a direct part in hostilities." Protocol I Additional, art. 51(3). Thus a civilian – a person who is not a member of the armed forces of a party to a conflict – cannot be treated as a combatant except during the actual time he or she is taking a direct part in hostilities, because those are the only persons who may lawfully be shot. Air Force Pamphlet 110-31, *International Law - The Conduct of Armed Conflict and Air Operations*, para. 3-3.a (1976). Padilla is not alleged to have been captured while participating directly in combat.

[22] *E.g.*, 317 U.S. at 31 n.9 (military commission tried "Major John Andre, Adjutant-General to the British Army"); *id.* at 32 n.10 (military commissions tried "T.E. Hogg, . . . being commission, enrolled, enlisted or engaged by the Confederate Government," "John Y. Beall, . . . holding a commission in the Confederate Navy," "Robert C. Kennedy, a Captain of the Confederate

In the 20th Century the executive continued to respect the distinction between members of foreign armed forces who were subject to military jurisdiction, and civilians who were not. During World War I, several spies who were German citizens and members of the German army were tried by military commissions. *See United States ex rel. Wessels v. McDonald*, 265 F. 754, 760-61 (E.D.N.Y. 1920) (upholding military jurisdiction). But two American citizens who were alleged to have participated in the conspiracy, but who were not members of the German army, were tried in federal court. *United States v. Fricke*, 259 F. 673 (S.D.N.Y. 1919); *United States v. Robinson*, 259 F. 685 (S.D.N.Y. 1919). Although American civilians had participated in the saboteurs' plot in *Quirin*, the only ones who were tried by military commission were members of the German military. Non-soldiers who conspired with them were tried in federal court. *See Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943) (concerning Haupt's father); CRS Report at 15; *cf. Yamashita*, 327 U.S. at 9 (carefully noting that case did *not* concern "power of military commissions to try civilians").

Not surprisingly, then, the Government attempts to cast Padilla as the equivalent of a soldier in order to subject him to military jurisdiction. US Br. 31, 32. But even the Government's own declaration attempting to make that case is forced to admit that Padilla is at most "closely associated" with "known members and leaders of the Al Qaeda terrorist

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Army," and other "soldiers and officers 'now or late of the Confederate Army'") (citation omitted); *id.* at 42 n.14 (military commissions tried "a number of Confederate officers and soldiers"). Insofar as certain offenses against the law of war, such as spying, might be committed by civilians as well as soldiers, at the time the Constitution was framed military jurisdiction in such cases was limited to "alien spies," not American citizens. *Id.* at 41. Although this limitation was lifted in response to the unique situation of the Civil War, the only citizen spy cases relied on by the Court in *Quirin* concerned trials by military commissions of "Confederate officers and soldiers," not civilians. *Id.* at 42 n.14.

network," but is not himself believed to be "a 'member' of Al Qaeda." Pet. App. 169a, 170a. On that reasoning, however, the civilians who conspired with the members of the German military in the Wessels and Quirin plots would also have been subject to military jurisdiction, because those civilians were plainly "closely associated" with the enemy armed forces. So too would the Milligan plotters have been. *See* 71 U.S. at 6 (Milligan conspirators were charged and convicted of "holding communication with the enemy"); *Quirin*, 317 U.S. at 45 (nonetheless, Milligan was "non-belligerent"). But this country's unbroken practice has been to try citizen civilians – even those who, like Padilla, were accused of aiding the enemy – in Article III courts.

2. The Government's attempt to extend *Quirin* far beyond its facts should be rejected in light of the Court's repeated admonitions in *Quirin* about the narrowness of its holding. The Court emphasized that "[w]e have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war," given that "petitioners here, upon the conceded facts, were plainly within those boundaries." 317 U.S. at 45-46; *see also id.* at 46 ("We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission").

The Court's attempt in *Quirin* to narrowly define its holding is best understood in the context in which that decision was issued. *Quirin* was decided under extraordinary procedures during our Nation's darkest days in World War II. The Court hastily assembled during its summer recess, on one or two days' notice, for two days of oral argument without advanced briefing. CRS Report at 16. The Court did not even have certiorari jurisdiction when it began hearing the case. *Quirin*, 317 U.S. at 19-20.[23] Immediately after argument, the

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[23] Although the petitioners moved to file original habeas corpus petitions,

Court issued a summary order upholding military jurisdiction without explaining why. *Id.* at 18, unnumbered note. Only later did the Court assemble the support for its action in an opinion that was issued after six of the seven petitioners – including Haupt, the petitioner who claimed American citizenship, and thus the only one whose circumstances are relevant here – had already been executed.[24] By then it was too late to revise the Court's judgment. As Justice Frankfurter noted later, *Quirin*'s deviation from standard procedures was "not a happy precedent." CRS Report at 39.[25]

It also appears that *Quirin* did not "rest [its] decision on the narrowest possible ground capable of deciding the case." *Dames & Moore*, 453 U.S. at 660. The Court addressed whether a military commission constitutionally could exercise jurisdiction over an American citizen based on the dubious *assumption* that Haupt was indeed a citizen. Haupt was born in Germany, but claimed to be a naturalized American citizen. 317 U.S. at 20. But the Government cited controlling authority that Haupt had forfeited any American citizenship through his allegiance to Germany. *Id.* And regardless of citizenship as such, Haupt's decision to abide in Germany after the United States' formal Declaration of War would have rendered him an *enemy alien* for purposes of the law of war. *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946); *see also Quirin*, 317 U.S. at 25 (recognizing that the petitioners were "enemy aliens"). The latter status distinguishes Haupt from American citizens

that motion was denied by the Court, so that certiorari was the only basis for the Court's jurisdiction. 317 U.S. at 18, unnumbered note (per curiam order).

[24] The executions were carried out on August 8, 1942, eight days after the Court's *per curiam* order was issued. CRS Report, at 15.

[25] Justice Douglas likewise explained: "Our experience with [*Quirin*] indicated . . . to all of us that is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble." *Id.* at 39.

generally, including Padilla.[26]

Since *Quirin*, this Court has reaffirmed the jurisdiction of military commissions over *aliens* abroad, but it has never again upheld military jurisdiction, here or abroad, over an American citizen who is not a member of our own armed forces, much less extended such jurisdiction beyond the facts of *Quirin* itself. *See Yamashita*, 327 U.S. at 9 (describing *Quirin*'s holding as one concerning "trials of *enemy aliens* by military commission[s]") (emphasis added); *Johnson v. Eisentrager*, 339 U.S. 763, 768-77 (1950) (sharply distinguishing the rights of American citizens and the rights of enemy aliens abroad). Indeed, even the President's recent order creating military commissions extends their jurisdiction only to aliens, not to citizens. Notice, *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833, § 2(a) (Nov. 16, 2001). The Government's ahistorical reading of *Quirin* ignores this distinction.

3. Nor do changed circumstances permit the President to exercise legislative powers in order to expand the categories of persons subject to military jurisdiction under *Quirin* and the laws of war. As the Court of Appeals recognized, this case does not require the Court to determine whether the "war on terror" fits into the legal category of armed conflict. Pet. App. at 30a. But it does require the Court to recognize that Padilla's detention raises profoundly different constitutional questions from the historical capture and detention of enemy soldiers as prisoners of war, to which *Quirin* alludes. *See* 317 U.S. at 31. The *Quirin* Court reached its decision in the context of a traditional war between nation-states and simply had no occasion to address the questions that would be raised in the circumstances of a "war" with a secret, non-state terrorist

[26] Enemy alien status requires a formal declaration of war against (or a formal presidential proclamation upon invasion or predatory incursion by) a foreign *nation or government*. *See Johnson v. Eisentrager*, 339 U.S. 763, 775 (1950); *Ludecke v. Watkins*, 335 U.S. 160 (1948); 50 U.S.C. § 21.

organization.[27]

In past armed conflicts, the President's power to detain prisoners of war without trial was inherently limited by the scope of the war. The persons subject to detention were easy to identify, since they were captured on the battlefield or were soldiers in the armed forces of the opposing government. The end of the war would be marked by a peace treaty with the opposing government, at which time prisoners would be returned home to resume their peacetime occupations.

The war on terror knows no such limits, and the power the President seeks is thus unlimited in ways that are impossible to square with our constitutional system of limited government and legal protection for individual liberty. The Government asserts that the President's authority cannot be limited to "traditional combat zones," and that he must have "authority to seize and detain enemy combatants wherever found, including within the borders of the United States." US Br. 37-38. It asserts that this power to detain may be exercised on the basis of undisclosed intelligence information that a citizen, exhibiting no overt signs of belligerency, has "associated" with the enemy. US Br. 4; Pet. App. 5a-6a. And it contends that the President alone may define who the enemy is. US Br. 35

[27] Indeed, the language from *Quirin* on which the Government relies (in *this* case) to define enemy combatants refers to "citizens who associate themselves with the military arm of the *enemy government*." *See* note 20, *supra*. Padilla simply does not meet that definition.

It is also ironic that the Government relies so heavily on the law of war – a body of customary international law, *see* U.S. Army Field Manual – when it has asserted in another case this Term that it is the role of Congress to "define and legislate offenses against the law of nations," and it condemns customary international law as "inherently indeterminate" and "ill-suited" to interpretation and enforcement by the courts in the absence of legislation specifically codifying it. US Br., *Sosa v. Alvarez-Machain*, No. 03-339, at 28-30, 35 (U.S. filed Jan. 23, 2004). Here, moreover, no *statute* even incorporates by *reference* the "law of war" or the "law of nations" as a basis for military *detention* – in sharp contrast to the jurisdictional statutes in both *Quirin* and *Sosa*.

(arguing that President's decision when and against whom to use his Commander-in-Chief powers in defense of the nation is "not conditioned on any action by Congress").

Moreover, unlike a traditional war, the "war on terror" may never end, and there is no clear point at which prisoners must be released. Thus, the extraordinary powers the President seeks today are not likely to be retired with the end of the "war," but are likely to become a permanent fixture of American law. The implication of the Government's position is that for the foreseeable future, any citizen, anywhere, at any time, is subject to indefinite military detention based on the President's determination that there is "some evidence" he has associated with a terrorist organization with violent intent. This would represent a dramatic shift in the constitutional balance of power in ways that the legislatively authorized trial by military commission of admitted German soldiers simply did not.

The extension of the laws of war beyond their internal limits and historical boundaries is a core legislative act, and not something that can constitutionally be accomplished by executive fiat. *See Youngstown*, 343 U.S. at 587 (Jackson, J., concurring) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker"). If this nation is to grant such new and awesome powers to its military commander, that decision must be made by our lawmakers – not by the very commander whose power is at issue.

Other democratic nations such as the United Kingdom and Israel have addressed the threat of organized terrorist networks through detailed legislation, carefully defining the circumstances under which suspected terrorists may be preventively detained and establishing procedural safeguards, including time limits and robust judicial review.[28] The model of a unilateral

[28] *See* Stephen J. Schulhofer, *Checks and Balances in Wartime*, 102 Mich. L. Rev. (forthcoming August 2004), *available in preliminary form at* http://students.law.umich.edu/mlr/schulhofer.doc.

and unlimited executive power to detain, as claimed by the Government here, not only is contrary to our own constitutional principles but would set a disturbing worldwide precedent. Certainly, Congress's decision in the days following September 11 to authorize the President to use military force simply does not reveal any intent by Congress to create a comprehensive scheme for preventive detention of suspected terrorists. And it does not reflect the kind of deliberation and democratic consensus that ought to be present before this Court passes on the constitutionality of such a dramatic departure from our traditions.

D. The President Does Not Have Authority Under the Commander-in-Chief Clause to Detain Padilla.

Because the AUMF does not authorize Padilla's military detention, and § 4001(a) expressly prohibits it, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Not even the most expansive reading of the President's authority can justify the extraordinary powers he asserts here.[29]

Time and again this Court has reaffirmed Alexander Hamilton's oft-cited observation that the powers conferred on the President by the Commander-in-Chief Clause "amount to nothing more than the supreme command and direction of the military and naval forces," *The Federalist* No. 69, at 418 (Alexander Hamilton) (Clinton Rossiter, ed. 1961), and imply no sweeping authority to seize people or property within American borders, even in times of war. *See Brown*, 12 U.S. at 128-29 (wartime seizure of enemy property, even where

[29] The President argues that his power to take whatever measures he deems appropriate to defeat the enemy is "not conditioned on any action by Congress." US Br. 35. Indeed, the Government goes so far as to suggest that Congress is constitutionally forbidden from interfering with the President's power to detain "enemy combatants." US Br. 49.

consistent with international norms, "is proper for the consideration of the legislature, not of the executive"); *Milligan*, 71 U.S. at 120 (President may not unilaterally establish commission to try civilians in wartime "because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws"); *Toth*, 350 U.S. at 14 ("assertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law").

The Court's most important pronouncement on the scope of the Commander-in-Chief Clause came in *Youngstown*. There, at the height of the Korean War, President Truman seized domestic steel mills in order to avert a strike, asserting his power as Commander-in-Chief and citing the "indispensability of steel as a component of substantially all weapons and other war materials." 343 U.S. at 590 (quoting Executive Order). The Court firmly rejected the argument. *Id.* at 587; *see also id.* at 644 (Jackson, J., concurring) (President "has no monopoly of 'war powers'").[30]

The Government cites no authority remotely suggesting that the President, acting in contravention of legislation by Congress, and absent a compelling military exigency, may seize an American citizen in the United States and detain him in a military prison. The Government places principal reliance on

[30] Similar to its response to § 4001(a), the Government argues that the seizure of domestic steel mills in *Youngstown* was improper only because President Truman addressed his order to the *civilian* sector, rather than the military. US Br. 36. Nothing in *Youngstown* suggests such a narrow basis for the Court's decision. Rather, Justice Black's opinion for the Court expressly noted that the taking of private property, even where necessary to supply soldiers in wartime, "is a job for the Nation's lawmakers, *not for its military authorities*." 343 U.S. at 687 (emphasis added). Indeed, the President's purported reliance on his military authority led Justice Jackson to admonish, "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." *Id.* at 646 (Jackson, J., concurring).

Quirin and *The Prize Cases*, but neither is on point. As discussed above, *Quirin* rested on express and specific statutory authorization of military trials. 317 U.S. at 26-27. In *The Prize Cases*, the Court simply made the unremarkable observation that the President could act to suppress an internal insurrection when there was no time for Congress to meet in advance. The President then sought, and received, express congressional approval at the earliest possible juncture. 67 U.S. (2 Black) 635, 670 (1862). In addition, the President already *had* express approval to repel insurgencies under prior acts of Congress. *See id.* at 668. Nothing in *Quirin* or *The Prize Cases* even hints at the remarkable proposition the Government asserts here: that the President may ignore the will of Congress and detain American citizens in a military prison simply because he is Commander-in-Chief.[31]

It is important to recognize the awesome nature of the unilateral authority the President claims: the inherent power under the Commander-in-Chief Clause to imprison citizens he decides are "associated" with organizations he deems to be "enemies" of the United States, indefinitely, without access to counsel, without meaningful judicial review, and without congressional authorization. And he claims the authority to exercise these extraordinary powers not simply overseas, or on the field of battle, or in situations where there is no time to go to Congress for authorization or to obtain review by the courts – but here, at home, when Congress and the courts are open and operating. These are powers fundamentally inconsistent with a democracy based on the rule of law.

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[31] The Civil War also involved conventional "organized armies," 67 U.S. at 670, under a secessionist government and thus was more similar to World War II than to the current "war on terror." Application of the law of war to the "current conflict" would raise constitutional questions that the Court in *Quirin* recognized but did not need to address on the conceded facts of that case. *See* 317 U.S. at 28-30, 45-46.

II. ANY MILITARY POWER TO DETAIN PADILLA CANNOT BE BASED SOLELY ON A DETERMINATION BY THE PRESIDENT.

The "Question Presented" by the Government is "Whether the President has authority as Commander in Chief and in light of [the AUMF] to seize and detain a United States citizen in the United States *based on a determination by the President* that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts. . . ." US Br. (I) (emphasis added). The military power to detain asserted by the Government is so vast that it cannot, consistent with the Due Process Clause, be based solely on a unilateral, unreviewable "determination by the President" that the individual is an "enemy combatant." The Government cites material outside the record concerning the supposed "process" it provided in connection with Padilla's detention as a "combatant." *See* US Br. 6-7 (claiming that "[t]he President's determination to detain Padilla as an enemy combatant was the result of a careful, thorough, and deliberative process consisting of several layers of review") (citing Feb. 24, 2004 speech of White House Counsel, published on Mar. 11, 2004 in the Congressional Record). But no matter how many internal (and wholly discretionary, *see* 150 Cong. Rec. S2701, S2704 (daily ed. March 11, 2004)) layers the Government now may advance to defend its actions, the President and his advisors alone cannot exercise the power to detain Padilla in a military prison.

1. The essential guarantee of the Due Process Clause of the Fifth Amendment is that the Government may not imprison or otherwise physically restrain a person except in accordance with fair procedures, which extend beyond the good faith and honorable intentions of executive decision-makers. "It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws, not of men." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 177 (1951) (Douglas, J., concurring). The Framers

were most alarmed by the prospect of unrestrained executive agents, free to "imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure." *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) (quoting 4 W. Blackstone, Commentaries on the Law of England 349-50 (Cooley ed. 1899)).

The President's "assertion that [his] action . . . can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law has no support in the decisions of this Court." *Sterling v. Constantin*, 287 U.S. 378, 402 (1932). Moreover, the due process requirement applies with full force during times of war to military detentions of citizens seized outside the zone of combat. *See Duncan*, 327 U.S. at 322-24; *Milligan*, 71 U.S. at 118-21; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963) ("It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process").

Thus, this Court has long recognized the dangers to liberty inherent in military detention and trial, "dangers . . . which were sought to be avoided by the Bill of Rights and Article III of our Constitution." *Toth*, 350 U.S. at 22; *see also Duncan*, 327 U.S. at 322-24 (explaining constitutional preference for Article III courts over military tribunals). In light of these dangers, this Court has held that Article III courts, not the President, are to determine the lawful scope of military jurisdiction. *See Toth*, 350 U.S at 23 (upholding a district court order releasing an ex-serviceman from military custody for want of military jurisdiction). Thus, for example, Article III courts have the authority on habeas corpus review to determine whether a court martial or military commission has exceeded its jurisdiction, and if so, to order the petitioner's release from military custody. *See, e.g., Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality). Without this important judicial safeguard, the boundary between civil society and the military would be

left in the military's hands, something the Framers sought to avoid.[32]

None of the cases cited by the Government supports the extraordinary claim that because of the conflict with al Qaeda, the President alone has authority to determine the jurisdictional fact that Padilla is an "enemy combatant." In *Quirin*, 317 U.S. at 21, *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), and *Territo*, 156 F.2d at 143, the factual findings giving rise to military jurisdiction were undisputed. In *Yamashita*, the petitioner was afforded counsel and the jurisdictional facts were established at trial after adversarial testing. 327 U.S. at 5. The facts in this case are neither "undisputed" nor "uncontrovertible." *See Walker v. Johnston*, 312 U.S. 275, 284 (1941). The "war on terror" cannot be used as an excuse to deprive courts of their core function of reviewing the legality of executive detention. *See St. Cyr*, 533 U.S. at 301.

2. A deprivation of liberty of the sort at issue here could never be accomplished based on a unilateral, unreviewable executive determination. "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation marks omitted);

[32] Moreover, judicial determination of jurisdictional facts such as these would have to be de novo, particularly because there have been no factual findings by an administrative tribunal to be reviewed under a more deferential standard. *See, e.g., Burns*, 346 U.S. at 142-43 (plurality) (de novo determination of claims not yet considered). It is firmly established that jurisdictional facts are subject to de novo review, *see Crowell v. Benson*, 285 U.S. 22, 63-64 (1932); *Ng Fung Ho v. White*, 259 U.S. 276 (1922), particularly when the scope of military jurisdiction is at issue. *See Burns*, 346 U.S. at 142 (plurality); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *United States v. Grimley*, 137 U.S. 147, 150 (1890). The Government's "some evidence" standard, *see* note 1 *supra*, underscores that the Government effectively contends that *no* review is appropriate and that the determination of combatant status simply may be made, in fact, "by the President." US Br. (I).

accord Grannis v. Ordean, 234 U.S. 385, 394 (1914). "The Due Process Clause entitles a person to *an impartial and disinterested tribunal* in both civil and criminal cases," and "[t]he requirement of neutrality has been jealously guarded by this Court." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (emphasis added); *see Weiss v. United States*, 510 U.S. 163, 178 (1994) ("impartial judge" required in military court-martial proceedings). Thus, in a criminal case, it is fundamentally unfair for the accusing authority also to be the factfinder of guilt or innocence, *In re Murchison*, 349 U.S. 133, 136-39 (1955), and, in an administrative proceeding, a neutral adjudicator must conduct a de novo review of all factual and legal determinations made by parties with enforcement duties. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 618 (1993). The Government's alleged "process," consisting only of multiple, discretionary reviews of the same one-sided information by advisors serving the President, cannot meet this standard.

Any scheme for military imprisonment of the sort advocated by the Government here would require, at least, the presentation of clear and convincing evidence at an adversarial hearing before a neutral fact-finder where the accused is assisted by counsel. In analogous cases, when personal liberty – an interest "far more precious . . . than property rights," *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 38 (1981) – was at stake, this Court has required a clear and convincing standard of proof. *See United States v. Salerno*, 481 U.S. 739 (1987) (pretrial detention without bail); *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Addington v. Texas*, 441 U.S. 418, 427 (1979) (civil commitment); *In re Winship*, 397 U.S. 358, 365-66 (1970) (juvenile delinquency); *Woodby v. INS*, 385 U.S. 276, 282 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization). Under the type of circumstances present here, the Court also has required access to counsel. *See In re Gault*, 387 U.S. 1, 36-

37 (1967) (juvenile delinquency); *cf. Salerno*, 481 U.S. at 755 (pretrial detention without bail); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (revocation of probation); *Lassiter*, 452 U.S. at 26-27 (recognizing "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty").

Moreover, it is "plain beyond the need for multiple citation" that a person's interest in freedom from indefinite physical detention is commanding. *Lassiter*, 452 U.S. at 27. That is particularly true where, as here, the "confinement . . . is not limited, but potentially permanent." *Zadvydas*, 533 U.S. at 691; *accord Demore v. Hyung Joon Kim*, 123 S. Ct. 1708, 1720-21 (2003). And the risk of an erroneous deprivation of liberty is particularly high in this case. Unlike a uniformed soldier taken into custody on the battlefield, a citizen like Padilla, arrested in a civilian setting on domestic soil, bears none of the indicia of combat. Any deference to executive judgment that might be appropriate in battlefield determinations is wholly absent here. In addition, the Government does not even argue that Padilla is a *member* of al Qaeda, claiming instead that he *associated* with that organization. US Br. 4-5. The scope and meaning of "associated with" are imprecise and invite government overreaching. Indeed, this Court often has emphasized that the definition of a class of detainable persons must be narrow and limited so that the Government's interests are sufficiently strong to justify detention. *See, e.g. Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (contrasting unconstitutional detention statute with one which "carefully limited the circumstances under which detention could be sought"); *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring) (suggesting that if a classification of harm "is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to

validate it").[33]

This Court need not define in the first instance, however, a constitutionally sufficient scheme for the military detention of citizens alleged to be "enemy combatants"– particularly in connection with the new, inherently amorphous "war on terror." Within our constitutional framework, it is for Congress to define, in the first instance, what an "enemy combatant" *is*; the *process* by a which a citizen may be subjected to military detention as such a combatant; and the *length of time* a citizen may be so imprisoned. Congress engaged in a similar exercise, carefully and after extensive debate, in the now-repealed EDA and with respect to the detention of certain aliens in the Patriot Act. Any such procedures enacted by Congress then would be subject to review by the courts. For purposes of the instant case, however, it is enough that the President certainly may not define these procedures on his own.

III. ON THE UNIQUE FACTS HERE, SECRETARY RUMSFELD IS A PROPER RESPONDENT SUBJECT TO PERSONAL JURISDICTION IN NEW YORK.

In an attack on personal jurisdiction rejected by every judge below, the Government claims absolute control over the

[33] There are many examples of erroneous accusations of terrorist activity, which underscores the need for strong procedural safeguards. *See, e.g., In re United States for Material Witness Warrant*, 214 F. Supp. 2d 356 (S.D.N.Y. 2002) (ordering government investigation into erroneous September 11-related charges brought against individual based on deliberately false statements by security guard); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402 (D.N.J. 1999) (granting writ of habeas corpus in case where detention was based on secret and false accusations of terrorism connections by ex-wife and detainee was able to effectively rebut accusations). There are, unfortunately, also cases where the Government has misled the courts. *See Korematsu v. United States*, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984) (writ of *coram nobis* granted and conviction vacated based upon, *inter alia*, finding that "the government knowingly withheld information from the courts when they were considering the critical question of military necessity in this case").

location where challenges to its actions may be heard. It contends that Padilla's habeas corpus petition was filed improperly in New York, even though the Government itself chose to bring Padilla there and then sent agents of the military to seize him there – after Padilla had been placed in custody by a federal judge on a grand jury warrant, and after the judge had scheduled a hearing on motions challenging that warrant. The Government contends that a habeas corpus action can only be brought where the soldiers chose to take Padilla. The issue here, however, is the legality of the seizure that occurred on Chief Judge Mukasey's doorstep.

Early in our history, Chief Justice Marshall warned that it would "be extremely dangerous to say, that because . . . prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the person so seized in any place which the general might select, and to which he might direct them to be carried." *Bollman*, 8 U.S. at 136. That admonition applies fully here. It is not Respondent who seeks to manufacture jurisdiction in a venue with no connection to the seizure he contends was unlawful. The Government could have taken Padilla anywhere; it chose South Carolina for its own reasons. As Chief Justice Marshall saw, it would be deeply disturbing if the Executive and the military could so control the jurisdiction of the courts. There is nothing in the law of habeas corpus that requires this Court to countenance that result. Indeed, "[t]he very nature of the writ demands that it be administered with the initiative and flexibility" necessary to "cut through barriers of form and procedural mazes" to reach "all manner of illegal detention." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

1. The Government first contends that suit is improper in New York because a "settled rule" requires that a "detainee must bring his challenge to his present, physical detention against his immediate, on-site custodian." US Br. 16. In fact, there is no such absolute requirement. The habeas corpus

statute, 28 U.S.C. § 2243, requires that the writ "shall be directed to the person having custody of the person detained," but it does not define *who* may be considered a proper custodian. *See, e.g., Eisel v. Secretary of the Army*, 477 F.2d 1251, 1258 (D.C. Cir. 1973) ("[n]owhere does the statute speak of an *immediate* custodian") (emphasis added).

This Court has not required that habeas petitioners always name their immediate custodian as respondent. To be sure, immediate custodians are frequently named, because that often is consistent with a "common sense administration of justice." *Sanders v. Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945). But this Court has recognized that the "concept[] of . . . custodian" is "sufficiently broad" to take account of the "reality" of the nature of a petitioner's confinement. *Strait v. Laird*, 406 U.S. 341, 344 (1971).

In numerous cases, the Court has considered habeas petitions involving "non-immediate" custodians who had legal control over the petitioner. *See, e.g., Endo*, 323 U.S. at 306 (high-ranking officials who had power to order petitioner's release from internment could be named when immediate custodian could not be reached by court); *Strait*, 406 U.S. at 345-46 (high-ranking officer could be named even though intervening officers would carry out relief sought); *Eisentrager*, 339 U.S. at 766-67 (Secretary of Defense and other senior officials could be named because "while prisoners are in immediate physical custody of an officer or officers not parties to the proceeding, respondents named in the petition have lawful authority to effect that release").[34] If the statute *required* that the "immediate" custodian be named, there would be no basis for these exceptions. These cases demonstrate that the

[34] *See also Garlotte v. Fordice*, 515 U.S. 39, 42 (1995) (naming Governor of Mississippi); *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995) (naming California Department of Corrections); *Toth*, 350 U.S. 11 (naming Secretary of the Air Force); *Burns*, 346 U.S. 127 (naming Secretary of Defense).

immediate custodian rule is not a talisman to be applied regardless of the circumstances of confinement. Instead, "[h]istorically, the question of who is 'the custodian' . . . depends primarily on who has the power over the petition and . . . on the convenience of the parties and the court." *Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998).

To justify its immediate custodian rule, the Government reaches back to *Wales v. Whitney*, 114 U.S. 564 (1885), a case this Court subsequently overruled as a "stifling formalism." *Hensley v. Municipal Court*, 411 U.S. 345, 350 & n.8 (1973). *Wales* held that habeas corpus relief was not available to a petitioner released on bail because the habeas provisions "contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body." 114 U.S. at 574. *Wales*'s reference to immediate custody was thus a corollary of a now-outmoded physical custody requirement. *Jones v. Cunningham*, 371 U.S. 236, 240 (1963); *Developments in the Law – Federal Habeas Corpus*, 83 Harv. L. Rev. 1072, 1073-75 (1970).

In finding that the Secretary was an appropriate respondent here, the courts below emphasized the narrow and unique circumstances of this case. Pet. App. 20a-21a, 104a-105a. This case involves an unprecedented *military* seizure in New York, pursuant to a presidential order directed to the Secretary of Defense, and involving a detention over which he, not Commander Marr, is directly responsible. As recognized below, it is the Secretary who (1) removed Padilla from the Southern District of New York, (2) determined that Padilla should be taken to the military brig in South Carolina, and (3) has the power to "decide[] when and whether all that can be learned from Padilla has been learned, and, at least in part, when and whether the danger he allegedly poses has passed." *Id.* at 105a. Secretary Rumsfeld, not Commander Marr, has the ultimate ability to "produce the body."

The Government fails to offer a single reason why this

habeas corpus challenge may not fairly proceed in New York where the military seizure occurred, other than pointing to a non-existent "settled rule." What is settled is that the writ "is not now and never has been a static, narrow, formalistic remedy." *Jones*, 371 U.S. at 243. Even courts that generally have required that the immediate custodian be named have suggested that the Government may not use the rule to "manipulate jurisdiction." *See Vasquez v. Reno*, 233 F.3d 688, 696 (1st Cir. 2000). Given the unique facts of this case, it would be a meaningless formalism, and a stark divergence from this Court's prior cases, to conclude that the Secretary is not an appropriate custodian for purposes of habeas corpus.

2. Personal jurisdiction over the Secretary can be exercised in New York on the specific facts here. The courts below correctly held, consistent with this Court's modern teaching, that jurisdiction over a respondent is determined by the limits of service of process and not antiquated notions of territoriality.

Section 2241 provides that "[w]rits of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions." 28 U.S.C. § 2241. Consistent with modern, contacts-based notions of personal jurisdiction, this Court has repeatedly interpreted "respective jurisdictions" to mean reachable by service of process, and has rejected the requirement that respondents be physically located within the territory of the court. While a divided Court had embraced the territorial view in *Ahrens v. Clark*, 335 U.S. 188 (1948), *but see id.* at 193 (Rutledge, J., dissenting), it broke from that approach over 30 years ago in *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973). Citing statutory and judicial developments that cut against an "inflexible territorial rule, dictating the choice of an inconvenient forum," *id.* at 500, *Braden* concluded in plain language that § 2241(a) "requires nothing more than that the court issuing the writ have jurisdiction over the custodian. *So long as the custodian can be reached by service*

of process, the court can issue a writ 'within its jurisdiction.'" *Id.* at 495 (emphasis added).

Braden reaffirmed the approach articulated earlier in *Strait* that a respondent can be fully "present" within a district court's jurisdiction by virtue of his contacts with the forum. 406 U.S at 345. Thus, the Court held that an Indiana respondent was "'present' in California through his contacts in that State [and was] therefore 'within reach' of the [California] federal court." *Id.* at 346 n.2. Embracing the foundational cases of modern personal jurisdiction, the Court explained "[t]hat such 'presence' may suffice for personal jurisdiction is well settled, and the concept is also not a novel one as regards habeas corpus jurisdiction." *Id.* (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)); *see also Endo*, 323 U.S. at 307 (exercising jurisdiction over War Authority officials as "respondents who ha[ve] custody of the prisoner . . . within reach of the court's process").

Upholding the jurisdictional determination below will not allow courts around the country to reach out and decide disputes with which they have no connection, as the Government contends. US Br. 25 n.11. It is not *Padilla* who has reached out for "one idiosyncratic district or appellate court anywhere in the nation" to force "the entire federal government [to] dance to its tune," *id.* (quotation marks omitted), and it is disingenuous for the Government even to suggest that here. Padilla, through his New York counsel as next friend, filed this action in New York because the Government had brought him there, because counsel was appointed to represent him there, and because the military unlawfully seized him there. It is the Government that has sought to force all litigation into "one idiosyncratic district or appellate court."

In this case, the lower courts based their finding of jurisdiction over the Secretary on specific acts he took within the district that brought him within New York's long arm

statute, and thus within Federal Rule 4(k)(1). The district court did not reach out to decide this case; rather, by his actions, the Secretary made it consistent with "notions of fair play and substantial justice" that he be sued there. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).[35]

Even if the question were close – which it is not – any uncertainty should be resolved to allow this Court to decide the issues of compelling national importance in this case now. *Subject matter* jurisdiction is not in doubt: the courts below had, and this Court has, *power* to decide this case. As Chief Justice Chase said, when the Government tried to erect similar procedural barriers to prompt judicial decision on this fundamental question in *Milligan*, "we are willing to resolve whatever doubt may exist in favor of the earliest possible answers to questions involving life and liberty." 71 U.S. at 132 (concurring opinion); *see also Quirin*, 317 U.S. at 19-20, 24-25.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

[35] The familiar requirements of venue are always available to ensure that litigation takes place in an appropriate forum. *See Braden*, 410 U.S. at 493-94 (setting out traditional venue considerations); 28 U.S.C. § 1404(a) (transfer for convenience). Thus, contrary to recent suggestions by the Seventh Circuit, a contacts approach does not allow petitioners to litigate in every judicial district. *See al-Marri v. Rumsfeld*, 360 F.3d 707, 709 (7th Cir. 2004). In this case, however, the Government *abandoned* its venue challenge. *Compare* Pet. App. 117a, *with id.* at 10a-26a.

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In the Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
PETITIONER

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The President, explicitly invoking Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Authorization or Authorization of Force), as well as his authority as Commander in Chief, made a determination that Jose Padilla "is, and at the time he entered the United States in May 2002, was, an enemy combatant," that Padilla is "closely associated with al Qaeda" and has engaged in "hostile and war-like acts," and that "it is in the interest of the United States that" he be detained "as an enemy combatant." Pet. App. 57a-58a. The President's determination represents a core exercise of the authority both conferred by Congress and granted him by Article II, and it makes clear that Padilla, under *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942), squarely fits this Court's definition of an enemy combatant subject to military seizure and detention.

Respondent's argument that the President lacks authority to order Padilla's military detention rests on two erroneous submissions: (i) that the President's action, although explicitly undertaken pursuant to Congress's Authorization, should be set aside on the ground that some more "clear statement" of authorization from Congress was required; and (ii) that Padilla—although he met repeatedly with senior al Qaeda operatives after the September 11 attacks, received training from al Qaeda operatives on wiring explosives and stayed at an al Qaeda safehouse in Pakistan, and returned to the United States at al Qaeda's direction to advance the conduct of attacks against the United States—is not an enemy combatant subject to military seizure and detention. Those arguments are rooted in a basic misunderstanding of this Court's decisions in *Quirin* and *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and in an equally flawed understanding of Congress's Authorization of Force and 18 U.S.C. 4001(a). In fact, the *Quirin* Court did not require the kind of clear congressional statement envisioned by respondent, and the majority of the *Quirin* saboteurs were not formally enrolled in the German army. On the antecedent question of

habeas jurisdiction, respondent likewise fundamentally misconstrues both this Court's decisions and the governing habeas statutes in arguing that jurisdiction can properly lie in the Southern District of New York over a challenge to Padilla's present confinement in South Carolina.

A. Habeas Jurisdiction In This Case Lies In The District Of South Carolina Rather Than The Southern District Of New York

The petition in this case challenges Padilla's present, physical confinement in South Carolina, and seeks both modification of the conditions of, and release from, that confinement. Clear principles of law and logic require such a petition to be filed in South Carolina. In a habeas action challenging present physical confinement, the proper respondent is the detainee's immediate physical custodian, and the custodian must be within the territorial jurisdiction of the district court. Respondent argues that Secretary Rumsfeld is a proper respondent, and that jurisdiction in this case would lie in *any* district court with long-arm jurisdiction over Secretary Rumsfeld. That outcome is foreclosed by the habeas statutes and this Court's decisions.

1. The proper respondent to the amended petition is Padilla's immediate custodian, Commander Marr

This Court long ago settled that in a habeas challenge to present confinement, the "person having custody of the person detained" (28 U.S.C. 2243) is the "person who has the *immediate custody* of the party detained." *Wales* v. *Whitney*, 114 U.S. 564, 574 (1885) (emphasis added); see *Pennsylvania Bureau of Corrections* v. *United States Marshals Serv.*, 474 U.S. 34, 38-39 (1985). It is undisputed that Padilla's immediate custodian is Commander Marr, Commanding Officer of the Brig where he is held.

Respondent asserts (Br. 46) that the habeas statutes allow naming as respondent any "non-immediate custodian" with a measure of "legal control" over the detainee. That contention cannot be squared with the Court's opinion in *Wales*, or with a long line of decisions applying the immediate custodian rule. To be sure, the Court since *Wales* has expanded its understanding of the circumstances in which a person is in "custody" for purposes of seeking habeas relief. See *Hensley* v. *Municipal Court*, 411 U.S. 345, 350 & n.8 (1973); Gov't Br. 18 n.6. But those developments do not affect the rule under *Wales* that the proper respondent in a traditional challenge to present confinement is the detainee's immediate custodian. The Court thus continues to rely on *Wales* for the rule that, when a "prisoner * * * seeks relief," the writ acts "upon the person who holds him," *i.e.*, the "jailer." *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 494-495 (1973) (internal quotation marks omitted).

The Seventh Circuit recently followed *Wales* in a unanimous opinion precisely on point here, holding that the proper respondent in a habeas action filed by a detained enemy combatant is the Commanding Officer of the Brig, not the Secretary of Defense. *Al-Marri* v. *Rumsfeld*, 360 F.3d 707, 709 (2004). As the court correctly explained, the "legal control" test espoused by respondent is relevant only if the challenge is to something other than present, physical confinement. In that situation, the "person having custody of the person *detained*" (28 U.S.C. 2243 (emphasis added)) necessarily is someone other than an immediate physical custodian, making it "necessary to identify as a 'custodian' someone who asserts the legal right to control that is being contested." 360 F.3d at 711. But that "does not imply that, when there is only one 'custody' taking the form of physical detention, anyone other than the warden or equivalent official is a proper respondent." *Id.* at 712.

Respondent errs for precisely that reason in relying (Br. 46) on cases like *Strait* v. *Laird*, 406 U.S. 341 (1972), involving unattached military reservists who sought release from their service obligations. Because an unattached reservist is not subject to any form of physical control or confinement, requiring him to proceed against an immediate custodian would "exalt fiction over reality." *Id.* at 344.[1]

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[1] Petitioner errs in relying (Br. 46) on *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), and *Ex parte Endo*, 323 U.S. 283 (1944). With respect to

2. The district court cannot reach a habeas custodian located beyond its territorial jurisdiction

The habeas statutes also confine district courts to issuing the writ "within their respective jurisdictions." 28 U.S.C. 2241(a). Congress added that constraint because it was thought "inconvenient, potentially embarrassing, certainly expensive, and on the whole quite unnecessary to provide every judge anywhere with authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat." *Carbo* v. *United States*, 364 U.S. 611, 617 (1961). The result is that, in a challenge to present detention, the writ is "issuable only in the district of confinement." *Id.* at 618; accord, *Al-Marri*, 360 F.3d at 709 (citing *Carbo* and *Wales*).

a. Respondent contends (Br. 48) that this Court initially embraced that understanding in *Ahrens* v. *Clark*, 335 U.S. 188 (1948), but disavowed it in *Braden*, *supra*. That argument is a "non sequitur." *Al-Marri*, 360 F.3d at 711. *Ahrens* held that habeas jurisdiction requires the presence within the forum district of *both* the custodian and the detainee. See 335 U.S. at 190-191. Subsequently, in *Peyton* v. *Rowe*, 391 U.S. 54 (1968), the Court overruled *McNally* v. *Hill*, 293 U.S. 131 (1934), and allowed a habeas petitioner to challenge his *future* confinement. Strict application of the requirement in *Ahrens* that both the custodian and detainee be present in the same district would effectively have nullified *Peyton* for prisoners like Braden, who were confined in one jurisdiction (Alabama) and sought to challenge a detainer related to future detention in a different jurisdiction (Kentucky). Braden filed his challenge to his future Kentucky confinement in the

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Johnson, because the Court in that case found "no basis for invoking federal judicial power in *any* district," it made no suggestion "as to where, if the case were otherwise, the petition should be filed." 339 U.S. at 790-791 (emphasis added). In *Endo*, the detainee properly named her immediate custodian as a respondent and filed where she was then held, which is precisely what respondent here declined to do. The Court found that Endo's later relocation by the government did not divest the initial habeas court of jurisdiction.

Western District of Kentucky. This Court, rather than limit the promise of *Peyton*, sustained jurisdiction by relaxing that part of *Ahrens* that required the *detainee* to be confined in the district in which he brings suit. *Braden*, 410 U.S. at 495-500.

Braden left wholly intact, however, the requirement that the *custodian* be located within the territorial jurisdiction of the district court in which suit is filed. See *Al-Marri*, 360 F.3d at 711-712; *Monk* v. *Secretary of the Navy*, 793 F.2d 364, 368-369 (D.C. Cir. 1986). For purposes of his challenge to his future detention in Kentucky, Braden "was in the custody of Kentucky officials," *Hensley*, 411 U.S. at 351 n.9, and "Braden sued his Kentucky custodian in Kentucky, just as § 2241(a) provides." *Al-Marri*, 360 F.3d at 711. But nothing in *Braden* remotely suggests that a challenge to Braden's present confinement in Alabama could have been brought anywhere but Alabama. See *id.* at 712.

b. Respondent understands *Braden* (Br. 49-50) to establish that a district court can reach any habeas respondent who would be subject to long-arm jurisdiction in a general civil suit, see Fed. R. Civ. P. 4(k)(1), a reading that would permit multiple district courts to assert jurisdiction in a given case (and potentially allow a single court to hear claims brought by detainees throughout the Nation, see *Al-Marri*, 360 F.3d at 710). The habeas laws make clear throughout, however, that only *one* district court has jurisdiction in a challenge to present, physical confinement—the district court for the district in which the detainee is held. See, *e.g.*, 28 U.S.C. 2242 ("If addressed to the Supreme Court, a justice thereof or a circuit judge [the application] shall state the reasons for not making application to *the* district court of the *district in which the applicant is held.*") (emphasis added); see Gov't Br. 23. Accordingly, when Congress decided to extend habeas jurisdiction to enable an additional district court to assert "concurrent jurisdiction to entertain the application" along with the "district court for the district

wherein such person is in custody," it amended the habeas statutes. 28 U.S.C. 2241(d).[2]

Respondent's argument, moreover, is foreclosed by *Schlanger* v. *Seamans*, 401 U.S. 487 (1971). Respondent's reasoning suggests that a habeas action like this one against a federal officer could be filed in *any* federal district in the Nation, because under 28 U.S.C. 1391(e), federal officers are subject to nationwide service of process in civil actions. But this Court held in *Schlanger* that Section 1391(e) does not relax the traditional rule in habeas cases that district courts may issue the writ only "within their respective jurisdictions." 28 U.S.C. 2241(a). The Court explained that, in habeas proceedings, "jurisdiction over the respondent [is] territorial," and "the legislative history of [Section 1391(e)] is barren of any indication that Congress extended habeas corpus jurisdiction." 401 U.S. at 490 & n.4. That result certainly survives *Braden*, which came just two years later: the *Schlanger* Court, accurately anticipating *Braden*, explained that "even under the minority view in *Ahrens*" under which "the critical element [is] not where the applicant [is] confined but where the custodian [is] located"—*i.e.*, the holding soon reached in *Braden*—there still was no jurisdiction in *Schlanger* because the custodian was not "within the territorial jurisdiction of the District Court." *Id.* at 490-491.

Respondent does not address or even cite *Schlanger*. But if, as *Schlanger* holds, a federal *statute* providing for nationwide service in civil cases fails to relax Section 2241(a)'s territorial constraint on habeas jurisdiction, a federal *rule* providing for service under state long-arm statutes in civil cases necessarily leaves that constraint unaffected. See Fed. R. Civ. P. 82 (Rules "shall not be construed to extend * * *

[2] Respondent focuses (Br. 48-49) on the Court's remark in *Braden* that jurisdiction lies "[s]o long as the custodian can be reached by service of process." 410 U.S. at 495. That statement does not purport to address *where* the custodian may be served, however, and the Court had no occasion in *Braden* to consider service beyond the district court's territorial jurisdiction. To the contrary, the Court explained that the Kentucky custodian was "properly served *in that district*," *i.e.*, within the Kentucky court's territorial jurisdiction. *Id.* at 500 (emphasis added).

the jurisdiction of the United States district courts."). Consequently, because Commander Marr (and even Secretary Rumsfeld) is located outside the Southern District of New York, the district court lacks jurisdiction.[3]

Padilla suggests (Br. 47) that none of this established law should apply here because of the "unique circumstances" of this case. But as the Seventh Circuit's decision in *Al-Marri* indicates, while the authority invoked to detain enemy combatants may be "unique" when compared to a typical criminal or immigration case, the resulting habeas challenge to the legality and conditions of an enemy combatant's present, physical confinement is a classic use of the writ. Perhaps for this reason, the Civil War-era precedents on which Padilla and his amici principally rely (*Milligan* and *Ex parte Merryman*, 17 F. Cas. 144 (C.C. Md. 1861) (No. 9487)) involved writs directed at the local military authorities and filed in the district of detention. Finally, although Padilla repeatedly refers to his "military seizure" in New York (Br. 47, 48), this case involves a habeas petition challenging the legality of his present detention in South Carolina, not a tort action challenging his military seizure in New York. Indeed, the specific claims for relief in Padilla's amended petition seek not only release from his present confinement in South Carolina, but also alteration of the conditions of his confinement in South Carolina. See J.A. 56. The nature of the relief sought only underscores the wisdom of the traditional habeas rules that require such a petition to be filed in South Carolina.

[3] Respondent errs in relying (Br. 45) on *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). That case in no way suggests that a habeas challenge to present confinement can be brought outside the district of confinement. To the contrary, the prisoners were detained in the District of Columbia, and filed for habeas relief there. See *id.* at 75-76. The language in the opinion cited by respondent pertains not to habeas jurisdiction, but to the proper location for *prosecuting* the prisoners. See *id.* at 136.

B. The President Has Authority As Commander In Chief And Pursuant To Congress's Authorization For Use Of Military Force To Order Padilla's Detention As An Enemy Combatant

1. The military's wartime authority to seize and detain enemy combatants fully applies to Padilla

a. The Court's decision in *Quirin* establishes that Padilla is squarely subject to the military's long-settled authority to detain enemy combatants in a time of war. The "universal agreement and practice" under the "law of war," the Court observed, holds that enemy combatants are "subject to capture and detention * * * by opposing military forces" in the course of an armed conflict. 317 U.S. at 30-31. The Court thus upheld the assertion of military control over the saboteurs (including an assumed American citizen), who had been seized by law enforcement agents in Chicago and New York before they could effectuate plans to destroy domestic war facilities.[4] The Court explained that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of * * * the law of war." *Id.* at 37-38.

That understanding directly applies here. The President determined, in materially indistinguishable terms, that Padilla is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war," that he has engaged in "hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States," that he "represents a continuing, present and grave danger to the national security," and that he "is, and at the time he entered the United States in May 2002 was, an enemy combatant." Pet. App. 57a-58a.

[4] The saboteurs claimed that they did not in fact intend to commit acts of sabotage, and they had been directed to commit no acts of sabotage within ninety days of arriving in the United States. See 317 U.S. at 25 n.4; Pet. Br. 8-9, *Quirin*, *supra* (Nos. 1-7, 1942 Term).

Indeed, whereas the *Quirin* combatants affiliated with German forces during World War II, received explosives training in Germany, and came to the United States with plans to destroy war facilities, Padilla was closely associated with al Qaeda after September 11, 2001, trained with al Qaeda and researched explosive devices at an al Qaeda safehouse, and returned to the United States to advance the conduct of further al Qaeda attacks. It follows that Padilla, as much as the *Quirin* saboteurs, is an "enemy belligerent[] within the meaning of * * * the law of war." 317 U.S. at 38.

b. Respondent nonetheless argues (Br. 12-16, 27-31) that this case is controlled not by *Quirin*, but by *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). That argument lacks merit. *Milligan* involved a citizen seized by the military and convicted by military commission on charges that he had conspired against the United States in the Civil War. *Id.* at 6-7. Although Milligan "conspired with bad men" to carry out acts damaging to the United States (*id.* at 131), he did not affiliate or train with Confederate forces (and in fact had never been a resident of any State in the Confederacy). See *id.* at 121-122.

Respondent argues (Br. 12) that "Padilla's case fits squarely within the framework of *Milligan*," and (Br. 15) that "*Quirin* was a narrow decision, explicitly confined to the precise facts before the Court." Respondent has it backwards. In *Quirin*, the Court unanimously confined *Milligan* to its specific facts, "construi[ing] the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it." 317 U.S. at 45. The Court found *Milligan* "inapplicable" to the circumstances in *Quirin*, explaining that Milligan, "not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war." *Ibid.* Padilla, by contrast, was determined by the President to be "closely associated with al Qaeda," and his actions directly parallel those of the *Quirin* combatants.[5]

[5] Respondent is no more successful in analogizing Padilla to the citizens charged with treason for aiding the *Quirin* saboteurs (Br. 30), than in

c. Respondent errs in perceiving (Br. 28) a "critical distinction" between the *Quirin* combatants' "membership" in the German forces and Padilla's "close association" with al Qaeda. The distinction is wrong as a matter of both fact and law. In the first place, "[i]t was unclear whether the saboteurs were civilians or not: only two of them, Burger and Neubauer, were formally enrolled in the German army." Michael Dobbs, *Saboteurs: The Nazi Raid on America* 204 (2004). Although they came ashore in partial uniforms to provide them with a plausible claim to prisoner of war status, and thus may have been assigned to military units, the majority were not enrolled in the military and were recruited from civilian life because of their ability to blend in once they arrived in the United States. For that reason, the government in *Quirin* emphasized that "civilians as well as soldiers are all within th[e] scope" of the war crimes charged. Gov't Br. 39, *Quirin*, *supra*; see also *Eisentrager*, 339 U.S. at 765 (dismissing as "immaterial" whether Germans were affiliated with civilian agency or military).

The Court in *Quirin* did not rest its decision on the formal status of the saboteurs, but rather held that a "non-belligerent" is a person who is not "a part of *or associated with* the armed forces of the enemy." 317 U.S. at 45 (emphasis added). The Court's use of the disjunctive and other state-

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analogizing Padilla to Milligan. As this Court recognized in *Quirin*, some conduct by citizens could constitute grounds for either a treason or war crimes prosecution, see 317 U.S. at 38, and the Executive has substantial discretion in choosing how to proceed. See *Colepaugh* v. *Looney*, 235 F.2d 429, 433 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957). But even if the difference between the *Quirin* saboteurs and the defendants in *Cramer* v. *United States*, 325 U.S. 1 (1945), and *Haupt* v. *United States*, 330 U.S. 631 (1947), reflected more than an exercise of executive discretion, there is no question that Padilla falls on the *Quirin* side of the line. The defendants in *Cramer* and *Haupt* did not travel abroad and train with enemy forces on using explosives. The *Quirin* saboteurs, like Padilla, did, and as a result were treated as enemy combatants and ultimately executed.

ments in the opinion preclude any argument based on formal membership rather than association.[6]

Any distinction based on formal membership also would have perverse implications. Under respondent's view, the *Quirin* saboteurs who were not enrolled in the military were immune from treatment as enemy combatants simply because they were not formally inducted into the armed forces. That rationale would stand the laws of war on their head, affording *more* protection to, and exempting entirely from the laws of war, enemy forces that violate the basic conditions for lawful belligerency—such as having a responsible command structure and wearing fixed insignia openly identifying association with enemy forces. See, *e.g.*, Ingrid Detter, *The Law of War* 136 (2d ed. 2000).

Al Qaeda does not wage war using conventional forces with formal command structures, membership ranks, and insignia. Indeed, because "Al Qaeda has no clear membership standards," formal membership in al Qaeda is essentially

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[6] See 317 U.S. at 37-38 ("Citizens who *associate* themselves with the military arm of the enemy" and "with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of * * * the law of war.") (emphasis added); *id.* at 35 n.12 (discussing "acts which, when committed within enemy lines by persons in civilian dress *associated with* or acting under the direction of enemy forces") (emphasis added). It is likewise well-established that individuals who are nominally civilians but associate with and aid the enemy are subject to military jurisdiction. That is particularly true with respect to the two Articles of War specifically charged in *Quirin*, Articles 81 and 82 (currently codified at 10 U.S.C. 904, 906), which govern providing intelligence to the enemy and spying. See Edmund M. Morgan, *Court Martial Jurisdiction over Non-Military Persons Under the Articles of War*, 4 Minn. L. Rev. 79, 97-112 (1920) (cited in *Quirin*, 317 U.S. at 41 n.13); William Winthrop, *Military Law and Precedents* 767 (2d ed. 1920), Gov't Br. 38-39, *Quirin*, *supra*; *id.*, App. II 72-77 (surveying history of use of military commissions including against civilians). See also *Quirin*, 317 U.S. at 42 n.14. It is telling that the provisions dealing with providing intelligence to the enemy and spying—unlike most provisions of the Uniform Code of Military Justice (UCMJ) which are limited to persons "subject to this chapter" or to "members of the armed forces," *e.g.*, 10 U.S.C. 884, 885—extend to "any person" who engages in the prohibited conduct. 10 U.S.C. 904, 906.

irrelevant. Audrey Kurth Cronin, *CRS Report RS21529, Al Qaeda After the Iraq Conflict*, at 3 n.10 (May 23, 2003). Cf. *Reid* v. *Covert*, 354 U.S. 1, 22-23 (1957) ("We recognize that there might be circumstances where a person could be 'in' the armed services * * * even though he had not formally been inducted into the military or did not wear a uniform.") (plurality). In any event, there is no question after *Quirin* that a person who receives explosives training from al Qaeda operatives at the direction of al Qaeda leaders and stays in an al Qaeda safehouse is associated with al Qaeda by any measure.

2. The President's exercise of Commander-in-Chief authority in this case is fully supported by Congress

The President's determination that Padilla should be detained as an enemy combatant is a basic exercise of the Commander-in-Chief power, and it falls well within the broad sweep of Congress's Authorization for Use of Military Force. The President's authority therefore is at its maximum. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981) (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). Respondent contends that the President's determination should be set aside on the ground that Congress did not speak with requisite clarity in its Authorization of Force. That argument is seriously flawed.

a. Respondent argues (Br. 36-38) that the President lacks any independent authority as Commander in Chief to order Padilla's detention as an enemy combatant. That issue is not directly raised by this case because Congress's Authorization of Force supplies an ample statutory basis for the President's action. But the President relied in addition on his authority as Commander in Chief—authority Congress acknowledged in its Authorization—and that reliance was fully justified.

The Commander-in-Chief Clause grants the President authority not only to defend the Nation when it is attacked, but also to "determine what degree of force the crisis demands." *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863); see *Campbell* v. *Clinton*, 203 F.3d 19, 27 (D.C. Cir.) (Silberman, J., concurring), cert. denied, 531 U.S. 815 (2000). The capture and detention of enemy combatants is an inherent part of waging war, and the President's decision whether to detain a person as an enemy combatant is a basic exercise of his discretion to determine the level of force needed to prosecute the conflict.

Contrary to respondent's argument (Br. 37), nothing in *Youngstown* casts doubt on the President's authority in this case. The President's order in *Youngstown* that the Secretary of Commerce take control of private steel mills to prevent a work stoppage is different in kind from the President's order that the Secretary of Defense detain Padilla as an enemy combatant. Whereas "the President's attempt to link the [steel] seizure to prosecuting the war in Korea was * * * too attenuated," "[i]n this case the President's authority is directly tied to his responsibilities as Commander in Chief" in conducting the conflict against al Qaeda. Pet. App. 64a (Wesley, J., concurring in part, dissenting in part).

To the extent both orders at an abstract level of generality could loosely be described as involving action in the "domestic sphere" (Pet. App. 32a), there is no rigid rule, as *Quirin* confirms, restricting the President's authority to detain combatants seized in domestic territory. Moreover, there is a significant difference between an exercise of the war power domestically to counter a domestic threat (as here and in *Quirin*) and a domestic initiative designed to aid the prosecution of a foreign war (as in *Youngstown*). That difference takes on added significance in view of the nature of the September 11 attacks, launched by combatants within the Nation's borders against targets on domestic soil. While the President's foreign affairs power may be at its zenith when he acts abroad, his Commander-in-Chief power is at its height when the Nation itself comes under attack. See *The Prize Cases*, 67 U.S. at 668.

b. The President not only invoked his authority as Commander in Chief, but also *explicitly invoked* the authority

conferred by Congress's Authorization of Force. The issue thus is not whether the President's determination in the abstract falls within Congress's Authorization, but whether the President permissibly concluded that it does. And when the President explicitly acts pursuant to a broad grant of authority from Congress in an area in which he also possesses independent constitutional powers, the courts may set aside the President's action as exceeding the authority conferred by Congress only in exceptional circumstances. See *Dames & Moore*, 453 U.S. at 678 ("[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.'") (quoting *Youngstown Sheet*, 343 U.S. at 637 (Jackson, J., concurring)).

Respondent thus fundamentally errs in arguing (Br. 16-27) that the President's action in this case must be set aside by the courts absent a "clear statement" by Congress authorizing it. In fact, *Quirin* instructs that the controlling clear statement principle runs in the reverse direction. As *Quirin* explains, a "detention * * * ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" is "not to be set aside by the courts without the *clear conviction* that [it is] in conflict with the * * * laws of Congress." 317 U.S. at 25 (emphasis added).

The Court's application of that standard in *Quirin* is instructive. Contrary to respondent's argument (Br. 18), the Articles of War then in effect did not provide "highly specific authorization" for detaining the saboteurs for trial by commission. Indeed, the Articles at that time did not specifically provide that they applied to *enemy* forces at all. See 317 U.S. at 27. Article 2 (ch. 227, 41 Stat. 787), entitled "Persons Subject To Military Law," set forth that the "following persons are subject to these articles," and the ensuing list referred only to United States personnel. Moreover, Article 15 (41 Stat. 790), on which the Court principally relied (317

U.S. at 28), did not affirmatively authorize a commission but did so by negative implication, stating that the "provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions * * * of concurrent jurisdiction in respect of offenders or offenses that * * * by the law of war may be triable by such military commissions." In addition, the Court rested its decision on the general charge, not tethered to any specific Article, of a violation of the common "law of war," rather than relying on the more specific charges of war crimes codified by Congress in Articles 81 and 82, 41 Stat. 804. 317 U.S. at 23, 46. Those are not the actions of a Court searching for a clear statement from Congress.

The remaining decisions relied on in support of respondent's clear statement rule do not suggest otherwise. For instance, in *Brown* v. *United States*, 12 U.S. (8 Cranch) 110 (1814), the Court held that the declaration of war in the War of 1812 did not of its own force permit seizure of personal property (a load of timber) belonging to an enemy alien and found in this country. That holding rested on the accepted rule under the law of war concerning personal property wholly unconnected to the hostilities; and it has no application to personal property usable for a war-related purpose. See William Winthrop, *Military Law and Precedents* 780 (2d ed. 1920) ("Private property * * * is now in general regarded as properly exempt from seizure except where suitable for military use or of a hostile character."). Indeed, this Court has emphasized the discretion granted to military authorities in dealing with contraband suitable for military use. See *United States* v. *Diekelman*, 92 U.S. 520, 526-527 (1876). The *Brown* decision thus sheds little light on the President's authority to seize and detain an enemy combatant. The Court in fact emphasized in *Brown* that the disputed seizure of property was not "made under any instructions from the president of the United States; nor is there any evidence of its having his sanction." 12 U.S. at 122.[7]

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[7] Respondent's argument for a clear statement rule also relies (Br. 17) on *Ex parte Endo*, 323 U.S. 283 (1944). The Court in *Endo* instructed,

c. There could be no "clear conviction" (*Quirin*, 317 U.S. at 25) in this case that the President's determination to detain Padilla as an enemy combatant lies beyond the broad authority conferred by Congress's Authorization of Force. Indeed, the President's action would readily satisfy even the standard proposed by respondent. Congress specifically recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism," Preamble, 115 Stat. 224, and Congress broadly authorized the President to use "*all* necessary and appropriate force" against the forces responsible for the September 11 attacks "in order to prevent *any* future acts of international terrorism against the United States," § 2(a), 115 Stat. 224 (emphasis added).

Because seizing and detaining enemy combatants is universally regarded as an essential part of warfare, see *Quirin*, 317 U.S. at 30-31, the Authorization of Force necessarily encompasses the detention of enemy combatants. That conclusion is reinforced by 10 U.S.C. 956(5), which gives the military standing *authorization* to use funds for expenses related to "persons in the custody of the [military] whose status is * * * similar to prisoners of war, and persons detained in the custody of the [military] pursuant to Presidential proclamation." Congress thereby communicated its acceptance that the use of military force inherently entails the detention of enemy forces. See *Dames & Moore*, 453

however, that the "fact that the Act" was "silent on detention does not of course mean that any power to detain is lacking." *Id.* at 301. The Court found that a statute with the "single aim" of protecting "the war effort against espionage and sabotage" failed to support the detention of a concededly loyal citizen. *Id.* at 300. "Detention which furthered the campaign against espionage and sabotage would be one thing," the Court explained, "[b]ut detention which has no relationship to that campaign is of a distinct character." *Id.* at 302. Here, by contrast, Congress sought to "prevent any future acts of international terrorism against the United States" by those individuals and organizations responsible for the September 11 attacks, § 2(a), 115 Stat. 224, and the detention of Padilla—an al Qaeda operative who trained with al Qaeda and stayed at an al Qaeda safehouse—has an obvious "relationship to that campaign."

U.S. at 677 (relying on statutes that are "highly relevant in the * * * sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented"). See also 10 U.S.C. 802(a)(9) (standing provision subjecting "[p]risoners of war in custody of the armed forces" to UCMJ).[8]

Respondent argues (Br. 23) that Congress's Authorization does not specifically address "military detention of citizens." But the Authorization supports the President's use of force against any "organization" or "person" that "he determines" aided the September 11 attacks, without suggesting any condition on that authority based on citizenship. § 2(a), 115 Stat. 224. The Authorization elsewhere uses the narrower term "citizen," recognizing the need to "protect United States citizens both at home and abroad." Preamble, 115 Stat. 224. Moreover, Congress acted with presumed understanding of the longstanding rule that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." *Quirin*, 317 U.S. at 37.

There likewise is no basis for concluding that the Authorization only permits detention of combatants seized "on the battlefield in Afghanistan." Resp. Br. 25. *Quirin* rejected any such distinction, 317 U.S. at 38, and it is especially unwarranted in the current conflict. Congress was reacting to attacks that were launched by combatants who were within the Nation's borders and who struck targets far from any traditional battlefield. Congress accordingly found that

[8] There is no merit to respondent's contention (Br. 27), with respect to 10 U.S.C. 956(5), that the Court in *Endo* rejected a "virtually identical" argument. *Endo* concerned a "lump *appropriation*" for the "*overall* program[s]" of the War Relocation Authority, 323 U.S. at 303 n.24 (emphasis added), which the Court concluded did not amount to implicit ratification of the particular aspect of the Authority's programs involving detention of concededly loyal citizens. Section 956(5) presents the reverse situation. It is an *authorization* measure rather than a funding measure, and it confers standing authority to use appropriated funds *specifically* for the purpose of detaining enemy combatants. In that sense, Section 956(5) is, if anything, more specific than the standing Articles of War relied on in *Quirin* as conferring a statutory basis for the President's actions in that case.

the attacks "continue to pose an unusual and extraordinary threat to the national security," and sought to ensure the protection of "citizens both at home and abroad." Preamble, 115 Stat. 224. The Authorization thus cannot plausibly be read as containing an unexpressed condition that the President confine his use of force to battlefields in Afghanistan.

More fundamentally, respondent's effort to read various unstated exceptions into Congress's sweeping language is misguided at its inception. As this Court has explained, "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take," and "[s]uch failure of Congress * * * does not, '*especially . . . in the areas of foreign policy and national security*,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore*, 453 U.S. at 678 (emphasis added) (quoting *Haig* v. *Agee*, 453 U.S. 280, 291 (1981)); see *id.* at 668 ("When the President acts pursuant to an express *or implied* authorization from Congress, * * * the executive action would be supported by the strongest of presumptions and the widest latitude of judicial interpretation.") (emphasis added) (internal quotation marks omitted). Accordingly, there is no basis for setting aside the President's determination, made in explicit reliance on the Authorization, on the ground that it falls outside the broad discretion conferred in him by Congress.[9]

d. Because the President's order that Padilla be detained as an enemy combatant was pursuant to Congress's Authorization of Force, the detention is "pursuant to an Act of Congress" for purposes of 18 U.S.C. 4001(a). Section 4001(a) therefore has no bearing on this case. In any event, Section

[9] Respondent argues (Br. 25-26) that the Authorization of Force must be construed narrowly to avoid rendering certain provisions in the Patriot Act superfluous. That argument is baseless. The cited provisions in the Patriot Act have nothing to do with the use of military force, but instead pertain to the Attorney General's detention, pending removal proceedings or criminal prosecution, of resident aliens suspected of, *inter alia*, terrorist activity. See 8 U.S.C. 1226a(a) (Supp. I 2001). The provisions apply without regard to whether an alien is associated with an enemy, and indeed, without regard to the existence of an armed conflict.

4001(a)—referred to by respondent, but *not Congress*, as the "Non-Detention Act" (Br. 20)—does not constrain the military's long-settled authority to detain enemy combatants. The statute's prohibition against the detention of American citizens "except pursuant to an Act of Congress" was directed at detention by civilian, not military, authority: in particular, the detention authority given the Attorney General under the Emergency Detention Act of 1950, and the detention camps instituted for Japanese-American citizens in World War II.

Respondent argues (Br. 20-21) that the World War II detention camps were largely controlled by military personnel, and contends more generally that Congress could not have perceived any significant distinction based on whether the detention of a citizen was at the hands of civilian or military authority. But the distinction between detention of loyal citizens by civilian authority and the detention of enemy combatants by military authority was drawn by this Court in *Ex parte Endo*, 323 U.S. 283 (1944). In ordering the release of a concededly loyal citizen from a World War II detention camp, the Court "noted at the outset" that it did not confront "a question such as was presented in [*Quirin* or *Milligan*] where the jurisdiction of military tribunals * * * was challenged." *Id.* at 297. The Court stressed that Endo "is detained by a civilian agency, the War Relocation Authority, not by the military," and that "[a]ccordingly, no questions of military law are involved." *Id.* at 298.

Congress also indicated its intention that Section 4001(a) speak solely to civilian detentions by deliberately styling the provision as an amendment to an existing provision in Title 18 ("Crimes and Criminal Procedure") rather than Title 10 ("Armed Forces") or Title 50 ("War and National Defense") —specifically, a provision directed to the Attorney General's control over federal prisons. 18 U.S.C. 4001(b); see 18 U.S.C. 4001 (1970). Although the Authorization of Force plainly extends to detentions, if Congress had intended Section 4001(a) to limit the President's authority over enemy combatants and had included it in Titles 10 or 50 with other provisions

relevant to the war power, some members of Congress might have alluded to it in debating the Authorization. By contrast, the War Powers Resolution, which is codified in Title 50 and is relevant to Congress when authorizing force, was discussed over 50 times in the legislative debates and is referenced in the Authorization. The President's authority—indeed, duty—to protect the United States when it comes under attack is too critical to construe it as limited by a statute manifestly directed at a different problem, so much so that no member of Congress referenced it in debating the Authorization, and neither the petitioner in this case nor the petitioner in *Hamdi* referred to it in the habeas petitions under review.

Under respondent's understanding that Section 4001(a) encompasses the military's detention of enemy combatants, the statute would bar the military from detaining—either as a prisoner of war or enemy combatant—an American citizen captured while fighting for the enemy in conventional battlefield combat. Congress should not be assumed to have intended to interfere in such an unprecedented manner with the President's exercise of his basic constitutional powers as Commander in Chief. See *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 455 (1989).

* * * * *

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be vacated and the case should be remanded with instructions that the amended petition be dismissed for lack of jurisdiction. In the alternative, the judgment should be vacated and the case should be remanded for further proceedings consistent with the Court's opinion.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

APRIL 2004

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD,
Secretary of Defense,

Petitioner,

vs.

JOSE PADILLA and DONNA R. NEWMAN,
as Next Friend of Jose Padilla,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does a federal district court have jurisdiction under 28 U. S. C. § 2241 to hear a habeas corpus petition when neither the prisoner, the immediate custodian, nor anyone in the custodian's chain of command is located within the district at the time the petition is filed?

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD,
Secretary of Defense,

Petitioner,

vs.

JOSE PADILLA and DONNA R. NEWMAN,
as Next Friend of Jose Padilla,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Although the present case is not a criminal case, it nonetheless involves a vicious, murderous attack on the American

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

people and a continuing conspiracy to commit additional and even more devastating attacks. Facilitation of such attacks by releasing the conspirators is therefore contrary to interests of the law-abiding public that CJLF was formed to protect.

In addition, the procedural mechanism used to accomplish this result, the writ of habeas corpus, is an area of law in which CJLF has developed substantial expertise. We have participated in most of this Court's major cases in this area in the last 15 years, including, among others, *Teague* v. *Lane*, 489 U. S. 288 (1989), *McCleskey* v. *Zant*, 499 U. S. 467 (1991), *Felker* v. *Turpin*, 518 U. S. 651 (1996), and *Williams* v. *Taylor*, 529 U. S. 362 (2000). We believe our expertise in this field will be helpful to the Court. As we are cognizant of this Court's Rule 37.1(a) and aware that many other *amici*, as well as the parties, will thoroughly brief the merits, this brief is limited to the question of habeas jurisdiction.

SUMMARY OF FACTS AND CASE

Al Qaeda, a terrorist organization, has for many years sought to injure the United States and its people by any means within its power. The most infamous such attack was the airplane hijackings of September 11, 2001, which destroyed the World Trade Center, damaged the Pentagon, and killed over 3,000 people in those buildings and on the airplanes. See *Padilla* v. *Bush*, 233 F. Supp. 2d 564, 570 (2002).

Al Qaeda is not finished, but is "committed to and involved in planning further attacks." *Id.*, at 571. The government believes that the habeas petitioner (respondent in this Court), Jose Padilla, also known as Abdullah al Muhajir, plotted with al Qaeda "to build and detonate a 'radiological dispersal device' (also known as a 'dirty bomb') within the United States . . . ." App. to Pet. for Cert. 169a-170a.

Padilla was arrested in Chicago on a material witness warrant issued by the United States District Court for the

Southern District of New York. See 233 F. Supp. 2d, at 568-569. He was removed from Chicago to New York, in the custody of the Justice Department, and counsel was appointed for him. *Id.*, at 571.

While a motion to vacate the warrant was pending, the President designated Padilla an enemy combatant and directed the Secretary of Defense to take him into custody. *Ibid.* He is presently in the Consolidated Naval Brig in Charleston, South Carolina, in the custody of the officer in charge there, Commander M.A. Marr. See *id.*, at 569.

On June 11, 2002, after Padilla's removal to South Carolina, his attorney filed the instant habeas corpus petition in the Southern District of New York. The District Court held that Padilla's attorney had standing to file the petition on his behalf. *Id.*, at 578. The court granted the government's motion to dismiss President Bush, finding he was not a proper party. *Id.*, at 578, 582. The court also dismissed Commander Marr. *Id.*, at 583. However, the court held that Secretary of Defense Rumsfeld was a proper party. *Id.*, at 582.

The District Court held, based on Second Circuit precedent and its interpretation of Supreme Court precedent, that it had territorial jurisdiction of the case simply because the Secretary of Defense was within the reach of New York's "long-arm" statute. *Id.*, at 583-587.

On the merits, the District Court determined that the President has the authority to detain enemy combatants and that the lawfulness of detention in Padilla's case would be determined on the basis of "whether the President had some evidence to support his finding that Padilla was an enemy combatant . . . ." *Id.*, at 610.

Both parties appealed. See *Padilla* v. *Rumsfeld*, 352 F. 3d 695, 702 (CA2 2003) (certification by District Court; grant of interlocutory appeal by Court of Appeals). The Court of Appeals affirmed on the standing, proper respondent, and jurisdictional issues. *Id.*, at 702-710. On the merits, the Court

of Appeals remanded with instructions to order Padilla released from military custody within 30 days. *Id.*, at 724. Judge Wesley dissented from this holding. *Id.*, at 726. This Court granted certiorari on February 20, 2004.

SUMMARY OF ARGUMENT

The phrase "within their respective jurisdictions" in 28 U. S. C. § 2241(a) places a territorial limitation on the habeas jurisdiction of United States District Court. The legislative and judicial history of this phrase had given it a settled meaning at the time Congress enacted the present section in 1948. The authorities are uniform to that time that when neither the petitioner nor the custodian is physically within the district, the district court has no habeas jurisdiction.

Developments since 1948 do not require, or even permit, a different result. Congress has made exceptions to the territorial rule but kept the basic rule intact. Decisions of this Court permitting habeas for future custody or minimally restrictive "custody" have required adjustments but have not abandoned the basic rule of territorial limitation.

Rules expanding extraterritorial jurisdiction in ordinary civil cases do not apply to habeas corpus. This includes Federal Rule of Civil Procedure 4(k)(1)(A), relied on by the Court of Appeals in this case. Under *Harris* v. *Nelson* and other cases, civil rules do not apply to habeas corpus where they are inconsistent with the special rules and statutes governing that unique proceeding. Where civil rules contradict the habeas statute's express limitation on the territorial extent of jurisdiction, the civil rules do not apply.

ARGUMENT

"Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*." 28 U. S. C. § 2241(a) (emphasis added). The question of jurisdiction must be answered first. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94-95 (1998). If the answer is negative, the court should not decide the merits. See *id.*, at 109-110.

I. The habeas corpus jurisdiction of the federal district courts is and always has been territorial.

A. The history of "within their respective jurisdictions" to 1948.

The history of Congress's expansion of the substantive scope of federal habeas from the Founding through Reconstruction has been traced many times. See, *e.g.*, Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31, 33-35 (1965). The present case requires an examination of a different aspect of these statutes, *i.e.*, their territorial limitations.

The First Congress enacted,

> "That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be

brought into court to testify." Judiciary Act of 1789, § 14, ch. 20, 1 Stat. 81-82.

The second sentence placed no express territorial limitation on the district courts, probably because it was understood. "This division and appointment of particular courts, for each district, necessarily confines the jurisdiction of the local tribunals, within the bounds of the respective districts, within which they are directed to be holden." *Ex parte Graham*, 10 F. Cas. 911, 912 (No. 5,657) (CC ED Pa. 1818).

On facts very similar to the present case, habeas relief was denied for lack of jurisdiction in *In re Bickley*, 3 F. Cas. 332 (No. 1,387) (SDNY 1865). Bickley had been in military custody in New York, but he had been moved to Massachusetts before the application was filed. See *id.*, at 333. Neither Bickley nor the immediate custodian was in New York, but the named respondent, the military commander for the entire region, was. See *ibid.* The court held that it had no jurisdiction. See *id.*, at 334.

In 1833, Congress added habeas protection for persons held in state custody for acts enforcing federal law. Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634-635. Again, no territorial limitation was expressly stated, or needed to be.

In 1842, Congress added protection for foreigners claiming to have acted under rights conferred by international law. "That either of the justices of the Supreme Court of the United States, or judge of any district court of the United States, *in which a prisoner is confined*, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus . . . ." Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 (emphasis added). By this time it was apparently thought necessary to explicitly state the territorial limit.

The largest expansion of habeas jurisdiction is the Reconstruction statute passed in 1867. When the bill reached the Senate, Senator Johnson objected that its broad language would give every district court nationwide jurisdiction. Cong. Globe,

39th Cong., 2d Sess. 730. "I do not see why the authority should not be limited to the circuit judge of the circuit where the party is imprisoned . . . ." *Ibid.* Senator Trumbull, the bill's sponsor, doubted the bill was susceptible of the construction Senator Johnson gave it, but agreed to examine the matter further.

A few days later the bill came up again. Senator Trumbull noted the previous objection that the bill might be misinterpreted such that "a judge in one part of the Union would be authorized to issue a writ of *habeas corpus* to bring before him a person confined in another and a remote part of the Union." *Id.*, at 790. To preclude this misinterpretation, Senator Trumbull proposed an amendment to add the words "within their respective jurisdictions." *Ibid.* Senator Johnson was satisfied that this language "removes [the] difficulty." *Ibid.*

These are two possible interpretations of these various acts. Either Congress intended the territorial scope of habeas jurisdiction to vary among the substantive grounds, or Congress understood all four acts to be equivalent in this regard. That is, "within their respective jurisdictions" in the 1867 act means substantially the same thing as the "in which a prisoner is confined" clause in the 1842 act, and both are consistent with the implicit limitation that was understood in the first two acts. The second interpretation seems the more plausible and it was soon confirmed by Congress itself.

In 1874, Congress enacted the Revised Statutes. "The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace, on the first day of December, 1873." *United States* v. *Bowen*, 100 U. S. 508, 513 (1880). "It was the declared purpose of Congress to collate all the statutes as they were at that date, and not to make any change in their provisions." *Smythe* v. *Fiske*, 23 Wall. (90 U. S.) 374, 382 (1874). The pertinent parts of the four pre-codification habeas statutes were combined into these sections:

"§ 751. The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus.

"§ 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

"§ 753. The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The limitation "within their respective jurisdictions" in § 752, taken from the 1867 act, applies to all the substantive grounds, which are combined in § 753. If there is any ambiguity in the phrase, courts look to the original statute and give it the same meaning, "unless a contrary intention is plainly manifested." *United States* v. *Le Bris*, 121 U. S. 278, 280 (1887). Since the phrase applies to the substantive ground from the 1842 act, it should have the same meaning as that act's limitation to the district "in which a prisoner is confined" if that is a plausible interpretation, which it certainly is.

The phrase "within their respective jurisdictions" was uniformly understood to be a territorial limitation on habeas jurisdiction until the next major recodification in 1948. See *Ex parte Kenyon*, 14 F. Cas. 353, 354 (No. 7,720) (CC WD Ark.

1878) ("This, of course, has reference to their territorial jurisdiction"). *In re Boles*, 48 F. 75 (CA8 1891) involved a habeas petition by a prisoner convicted in a territorial court in Oklahoma, which was then within the Eighth Circuit, but who was confined outside the circuit. See *id.*, at 75-76. The court held, "we cannot issue the writ in question to be served in another circuit . . . ." *Id.*, at 76. In *Ex parte Gouyet*, 175 F. 230 (D. Mont. 1909), the court understood the statutory phrase to be an express restriction "to the territorial jurisdiction of the court where the application is made," *id.*, at 233, denying it jurisdiction to grant habeas corpus for a prisoner convicted in that court but confined elsewhere.

In cases where the prisoner and the custodian are both outside the territorial jurisdiction, the cases through 1948 are uniform that there is no jurisdiction. See, *e.g.*, *United States ex rel. Belardi* v. *Day*, 50 F. 2d 816, 817 (CA3 1931); *United States ex rel. Quinn* v. *Hunter*, 162 F. 2d 644, 648-649 (CA7 1947) (temporary presence of both in court was insufficient).

Ahrens v. *Clark*, 335 U. S. 188 (1948) was decided nearly contemporaneously with the enactment of the overhauled Title 28, obviously too late to have had any impact on Congress's drafting of the new habeas law. Even so, the cases cited in it give us a view of what the phrase "within their respective jurisdiction" was understood to mean when Congress decided to reenact it.

Ahrens cites *Bickley*, *Boles*, *Gouyet* and other cases for the "general view" of strict territoriality. See *id.*, at 190. Two cases are cited with a "but see" signal. See *id.*, at 190, n. 1. *Ex parte Fong Yim*, 134 F. 938 (SDNY 1905) is an immigration case. Two children were detained in the Northern District. The immigration officer was in the Southern District, admitted the children were in his custody, and stipulated that they need not be brought into court. The court's decision on jurisdiction is based on this admission and stipulation, see *id.*, at 939, implying a kind of estoppel. *Ex parte Ng Quong Ming*, 135 F. 378,

379 (SDNY 1905) is another decision by the same judge on the same ground.

Two District of Columbia cases are cited with a "cf." signal. *Ahrens*, 335 U. S., at 190. *Sanders* v. *Allen*, 100 F. 2d 717 (CA DC 1938) was a habeas petition by a prisoner convicted in a D.C. court and confined in the "District workhouse at Occoquan," Virginia. *Id.*, at 718. The court held that in these circumstances the presence in the District of Columbia of the correctional officials was sufficient to give jurisdiction. See *id.*, at 719. However, the court reiterated its adherence to the holding of *McGowan* v. *Moody*, 22 App. D. C. 148, 163 (1903), that the presence in the district of the Secretary of the Navy was insufficient to confer jurisdiction to hear a habeas petition by a prisoner in Guam. See *Sanders*, *supra*, at 720. *Tippett* v. *Wood*, 140 F. 2d 689 (CA DC 1944) is not a habeas case at all, but a mandamus action. Jurisdiction is discussed only in the dissent. See *id.*, at 693 (Arnold, J., dissenting).

In *Ex parte Endo*, 323 U. S. 283, 305 (1944), the Court specifically declined to reach the question of whether presence of the person detained within the district at the time of filing is a prerequisite to jurisdiction. The case holds only that the petitioner's removal to another district after filing does not defeat the jurisdiction. See *id.*, at 306. The statements in *Endo* regarding a respondent being within reach of the court's process relate to the actual granting of relief, not the initial acquisition of jurisdiction. See *id.*, at 306-307.

In short, at the time of *Ahrens*, which is also the time of enactment of 28 U. S. C. § 2241, there was universal agreement in the cases that habeas corpus jurisdiction was subject to territorial limits. The majority view was that confinement of the prisoner in the district was a jurisdictional requirement. A handful of cases held that presence of the custodian was sufficient, although some of these seem to be based on a waiver or estoppel theory.

In *Ahrens*, the Court interpreted the phrase "within their respective jurisdictions" in accordance with the majority view, *i.e.*, strictly requiring confinement within the district as a nonwaivable jurisdictional prerequisite. See 335 U. S., at 190, 193. The dissent agreed that these words did impose a territorial limitation on the jurisdiction, but thought the presence of the custodian within the jurisdiction was sufficient. See *id.*, at 202-203, 206 (Rutledge, J., dissenting). The dissent did not question the correctness of the cases denying jurisdiction "where both the custodian and his prisoner are outside the territorial jurisdiction of the court . . . ." *Id.*, at 203. Indeed, the dissent asserted "it is with that class alone, in my opinion, that the phrase 'within their respective jurisdictions' sought to deal." *Id.*, at 204.

On the eve of the enactment of § 2241, then, this Court was unanimous on the meaning of the phrase "within their respective jurisdictions" as applied to cases such as the present case. When neither the custodian nor the place of confinement is within a district court's district, that court has no habeas jurisdiction.

B. The 1948 Code.

1. The habeas statutes.

From the wording of the 1948 revised habeas statutes, there can be little doubt that Congress intended to preserve the rule of territorial habeas jurisdiction. As originally enacted (and "cleaned up" the following year), the first two sections of the habeas chapter read as follows:

"§ 2241. Power to grant writ

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*. The order of a circuit judge shall be entered in the records of the

district court of the district *wherein the restraint complained of is had.*

"(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to *the* district court having jurisdiction to entertain it.

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

"(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

"(5) It is necessary to bring him into court to testify or for trial.

"§ 2242. Application

"Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

"It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has

custody over him and by virtue of what claim or authority, if known.

"It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

"If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application *to the district court of the district in which the applicant is held.*" 62 Stat. 964-965 (emphasis added); 63 Stat. 105 (adding commas in § 2241(b)).

This wording strongly implies the traditional territorial understanding of *Ahrens*. The phrase "within their respective jurisdictions" was uniformly understood to be a territorial limitation, with only minor differences not pertinent here remaining unsettled. See Part I-A, *supra*. Congress "used the same words, and we can only assume it intended them to have the same meaning that courts had already given them." *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992).

The second sentence provides for the order of a circuit judge to be entered "in the records of the district court of the district where the restraint complained of is had." It would be an odd provision to enter the order of a circuit judge in a district court of another circuit.

Subdivision (b) uses the definite article when permitting transfer to "*the* district court having jurisdiction to entertain it." This implies that Congress believed there was only one. The last sentence of § 2242 eliminates any ambiguity as to which district that was. An application to an appellate court or judge must explain why the application is not made "to the district court of the district in which the applicant is held." It would be nonsensical to require such an explanation unless that is the district court with jurisdiction.

The limitation of habeas corpus to the territory of the district has created some practical problems. As these problems have arisen, Congress and this Court have created alternatives

or ways around the problems but have never abandoned the basic rule of territorial jurisdiction. The manner in which these problems have been resolved indicates that territorial jurisdiction remains the rule until Congress decides to change it, and then only to the extent that Congress changes it.

2. Section 2255.

The most obvious and frequent problem was the use of habeas corpus as a collateral attack on criminal judgments by federal prisoners. The problems are discussed at length in *United States* v. *Hayman*, 342 U. S. 205, 210-214 (1952). Congress could have altered the territorial rule for habeas in this situation, but it chose instead to create an entirely new procedure in 28 U. S. C. § 2255. "This is not a habeas corpus proceeding." *Hayman*, *supra*, at 220. Hence, the territorial limitation on habeas recognized in *Ahrens* is simply inapplicable. The fact that Congress would go to the lengths of creating an entirely new non-habeas procedure rather than simply changing the territorial limitation for habeas indicates that Congress was committed to retaining the territorial limitation for habeas as a general rule.

3. The 1966 amendment.

Under the 1948 act, state prisoners still had to file in the district of confinement, even if the district of conviction was elsewhere. In large states with multiple districts, this presented a problem similar to that for federal prisoners before § 2255. In 1966, Congress made the first outright exception to the rule of territorial jurisdiction, adding § 2241(d) to give the district of conviction concurrent jurisdiction. Pub. L. 89-590, 80 Stat. 811. "The legislative history . . . suggests that Congress may have intended to endorse and preserve the territorial rule of *Ahrens* to the extent that it was not altered by those amendments." *Nelson* v. *George*, 399 U. S. 224, 228, n. 5 (1970).

4. The future custody problem.

Additional problems were created by several decisions of this Court expanding the definition of "custody" for the purpose of habeas jurisdiction and expanding the available relief beyond immediate release. *Peyton* v. *Rowe*, 391 U. S. 54, 55 (1968) held that a defendant sentenced to concurrent terms could attack the second sentence on habeas, even though he had not begun to serve that sentence. Under *Peyton*, a grant of habeas relief is, in effect, a declaratory judgment regarding future custody. It may have nothing to do with the present custodian, who may not even be an official of the same state.

The incongruity and inconvenience of litigating future custody in a jurisdiction which has nothing to do with that custody led to a break with the strict *Ahrens* rule in *Braden* v. *30th Judicial Circuit Court*, 410 U. S. 484 (1973). See *id.*, at 493-494 (practical difficulties). *Braden* adopted the view that custodian, not the prisoner, is the focus of the words "within their respective jurisdictions," citing the *Ahrens* dissent. See *id.*, at 495.

There is expansive language in the *Braden* opinion that could be read as going far beyond the theory of the *Ahrens* dissent and abandoning the territorial limit on habeas altogether, extending habeas jurisdiction wherever "long-arm" service of process might reach. See *ibid.*; *id.*, at 500. Given the substantial contrary authority and the absence of any need for such a sweeping holding to decide the case, any such implication should be considered nonbinding dicta. Cf. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 572-573 (1993) (Souter, J., concurring in part and concurring in the judgment). The theory of the *Ahrens* dissent, that the presence of the custodian (or, in this case, would-be future custodian) within the district met the territorial requirement, is sufficient to resolve the case and is consistent with a narrow reading of the opinion.

Congress implicitly endorsed the result in *Braden* when it adopted the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"). See Pub. L. 94-426, § 1, 90 Stat. 1334 (1976). Habeas Rule 2(b) directs that the attorney general of the state be named a respondent in future custody cases.

5. The loose custody problem.

Another problem results from the expansion of habeas corpus to people who are not incarcerated, but rather in "custody" only under a very loose definition of that term. *Wales* v. *Whitney*, 114 U. S. 564, 571-572 (1885) defined custody in terms very similar to the present definition of "seizure." Cf. *California* v. *Hodari D.*, 499 U. S. 621, 626 (1991). *Wales* was overruled in *Hensley* v. *Municipal Court*, 411 U. S. 345, 350, n. 8 (1973), where a defendant released on his own recognizance and subject to very minimal restrictions was held to be in custody. See *id.*, at 354-355 (Rehnquist, J., dissenting). In cases of minimal restraint, there is no immediate custodian in the traditional sense of the person in charge of the institution of confinement. The nominal custodian may be far removed from the location of the petitioner.

In *Schlanger* v. *Seamans*, 401 U. S. 487, 487-488 (1971), an Air Force enlisted man assigned to Moody AFB, Georgia, was granted "permissive temporary duty" to attend Arizona State University at his own expense and not as part of the ROTC program at that campus. He sought release from the military by filing a habeas corpus petition in the District Court in Arizona. See *id.*, at 488. The respondents were the Secretary of the Air Force, the Commander of Moody AFB, and the Commander of the AFROTC program at ASU. The latter was not a proper respondent, as he had no control over the petitioner. See *id.*, at 489.

The *Schlanger* Court noted once again that habeas jurisdiction is limited by the statutory phrase "within their respective jurisdictions." See *ibid.* "The question in the instant case is

whether any custodian, or one in the chain of command, as well as the person detained, *must be in the territorial jurisdiction of the District Court*." *Ibid.* (emphasis added). The answer is yes. *Id.*, at 490-491.

Schlanger is on point and controlling if it is still good law. The Court of Appeals in the present case attempts to read a distinction into the *Schlanger* Court's lack of separate discussion of the Secretary of the Air Force. See *Padilla* v. *Rumsfeld*, 352 F. 3d 695, 706, n. 12 (CA2 2003). The reason for lack of a separate discussion is obvious and does not distinguish the cases. The Court squarely held that the Secretary of the Air Force was not "present" in Arizona for this purpose. *Schlanger*, 401 U. S., at 488-489. The question is whether this holding survives *Strait* v. *Laird*, 406 U. S. 341 (1972).

Strait involved the unusual circumstance where the nominal custodian was the commander of a records center where petitioner had never been. See *id.*, at 342. The petitioner was in California, and all of his face-to-face contacts with the military had been there. See *id.*, at 343-344. *Strait* itself says it does not "abandon *Schlanger*," *id.*, at 343, but rather distinguishes it based on the unusual facts of *Strait*. *Strait* stretched the concept of presence to include a situation where the custodian exercised continuing control in the district through military intermediaries who were physically present in the district. See *id.*, at 345. There is no need to stretch it any further, and it cannot be stretched to cover the present case without overruling *Schlanger*. *Strait* is consistent with the territorial rule that has governed habeas corpus from the beginning: when *neither* the prisoner nor the custodian is physically present in the district, there is no habeas jurisdiction.

II. Long-arm statutes do not change the territorial rule of habeas corpus.

The Court of Appeals believed that jurisdiction in this case was provided by Federal Rule of Civil Procedure 4(k)(1)(A),

authorizing "jurisdiction over the person of a defendant ¶ (A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state where the district is located . . . ." See *Padilla* v. *Rumsfeld*, 352 F. 3d 695, 709 (CA2 2003). Preliminarily, we question whether this rule applies even on its face. A federal official is *not* subject to the jurisdiction of any state court regarding the custody of a federal prisoner. See *Ableman* v. *Booth*, 21 How. (62 U. S.) 506, 524 (1859). We need not belabor this point, however, because a simpler and better understood principle precludes the use of this rule in this context.

Schlanger v. *Seamans*, 401 U. S. 487, 488 (1971) considered and rejected the proposition that rules for broadening the venue of ordinary civil actions operate to broaden the territorial jurisdiction in habeas corpus. See *id.*, at 490, n. 4. "Though habeas corpus is technically 'civil,' it is not automatically subject to all the rules governing ordinary civil actions." *Ibid.* (citing *Harris* v. *Nelson*, 394 U. S. 286 (1969)). "Essentially, the proceeding is unique." *Harris*, *supra*, at 294. As originally promulgated, the Civil Rules had "very limited application to habeas proceedings." *Id.*, at 295. Civil Rule 81(a)(2) simply continued the application of civil rules to habeas proceedings to the extent they had been applied before the promulgation of the rules, but not further. *Id.*, at 294. To the extent the Civil Rules introduced procedural innovations, such as broad discovery, they did not apply to habeas. See *id.*, at 295. The *Harris* Court also noted "the unsuitability of applying to habeas corpus provisions which were drafted without reference to its peculiar problems." *Id.*, at 296. Discovery as it exists in federal civil litigation was unsuited, because it would "do violence to the efficient and effective administration of the Great Writ." *Id.*, at 297. Habeas Rule 11 is "intended to conform with the Supreme Court's approach in the *Harris* case." Advisory Committee's Notes on Rules Governing Section 2254 Cases in the United States District Courts Rule 11, 28 U. S. C., p. 479 (2000 ed.).

Harris was applied to Federal Rule of Civil Procedure 60(b) in *Pitchess* v. *Davis*, 421 U. S. 482 (1975) (*per curiam*). A habeas petitioner successfully obtained a new trial, but then sought to preclude a retrial. He asked the Federal District Court to change its judgment from a conditional to an unconditional writ. *Id.*, at 484-485. Under the circumstances, the basis of this claim could not be exhausted in state court until the post-trial appeal. See *id.*, at 488. The Court held that Rule 60(b) could not be used to evade the exhaustion rule. Civil Rule 81(a)(2) precluded use of the Civil Rules in a manner contrary to the habeas statutes. "Since the exhaustion requirement is statutorily codified, even if Rule 60(b) could be read to apply to this situation it could not alter the statutory command." *Id.*, at 489.

Astonishingly, the Court of Appeals simply ignored this well-known and long-established limitation on applying civil rules to habeas corpus. The court noted in a footnote the government's argument that Federal Rule of Civil Procedure 4(k)(1)(A) was "inapplicable in the habeas context," *Padilla*, 352 F. 3d, at 709, n. 18, but it did not discuss or distinguish *Harris*, *Pitchess*, or any other case in this area.

Habeas corpus cases often involve a judicial demand that the executive release a person it considers to be extremely dangerous. At times, it can involve the release of persons the government believes to be a threat to its very existence. "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?" Abraham Lincoln, Message to a special session of Congress (July 4, 1861), quoted in W. Rehnquist, All the Laws But One: Civil Liberties in Wartime vii (1998); see also *id.*, at 26, 32-39 (background of *Ex parte Merryman*, 17 F. Cas. 144 (No. 9,487) (CC Md. 1861)). There is no reason to believe that Congress intended litigants to have as much leeway in choosing their forum in such cases as it has permitted the Civil Rules to give them in routine suits over torts and contracts. Congress's contrary intention is plain on the face of the statute. It retained the limitation "within their respective jurisdictions," which was

understood at the time of enactment to be a traditional territorial limit.

The Court of Appeals' interpretation, opening habeas jurisdiction to any district where a cabinet secretary has the minimum contacts needed to satisfy *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), see 352 F. 3d, at 709-710, effectively allows a federal prisoner to sue a cabinet-level officer in nearly any district of his choice. We need not speculate whether such an expansive view would lead to shameless forum-shopping or whether a court would permit such a travesty. It has already happened. In *Gherebi* v. *Bush*, 352 F. 3d 1278, 1301-1302 (CA9 2003), stay granted *Bush* v. *Gherebi*, 124 S. Ct. 1197 (2004), the Ninth Circuit upheld habeas jurisdiction in the Central District of California based solely on the presence of military installations there, even though those installations had nothing whatever to do with the case. This holding is irreconcilable with *Schlanger*, which held that the District Court for the District of Arizona had no jurisdiction in habeas over the Secretary of the Air Force, despite the existence of an AFROTC program at Arizona State University, when that program had nothing to do with the petitioner or his case. See *supra*, at 16-17.

Habeas corpus is a unique proceeding, governed by unique rules. Civil rules may be used if, and only if, they are appropriate to the proceeding and do not conflict with the specific habeas rules and statutes. Rule 4(k)(1)(A) and its incorporation of the New York long-arm statute conflict with the territorial jurisdiction limitation of 28 U. S. C. § 2241(a). They are therefore inapplicable.

Neither the prisoner nor the custodian was present in New York on the day this petition was filed. They were both in South Carolina. Jurisdiction was therefore in the District of South Carolina and not in the Southern District of New York.

CONCLUSION

The decision of the Court of Appeals for the Second Circuit should be reversed and the case remanded with instructions to dismiss for lack of jurisdiction.

March, 2004

Respectfully submitted,

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(4)

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In The
Supreme Court of the United States

DONALD RUMSFELD,

Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN
AS NEXT FRIEND OF JOSE PADILLA,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

BRIEF OF AMICUS CURIAE THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE THE COMMONWEALTH OF VIRGINIA[1]

By ratification of the Constitution and entry into the Union, the people of the fifty States have expressly assigned to the National Government the responsibility and authority to provide for their common defense. Being thus dependent on the National Government for its security, the Commonwealth of Virginia has a vital interest in preserving within that government – and, especially, in the Commander-in-Chief – sufficient authority for waging war vigorously and successfully upon our foes, including the new enemy, Al Qaeda. It is an interest underscored by the September 11 attack on Virginia soil, and by the presence in Virginia of numerous sites – military, economic and symbolic – against which future terrorist attacks might be launched.[2]

At the same time, Virginia remains deeply devoted to preserving the blessings of liberty that have been the hallmark of our national character since the days of our

---

[1] Given the expedited briefing schedule, the Commonwealth of Virginia has not sought additional signatories on this brief by circulating it among the States.

[2] Examples of military sites include the Pentagon, Langley Air Force Base (headquarters of Air Force Combat Command), Norfolk Naval Station (headquarters of Atlantic Fleet), Quantico (headquarters of Marine Combat Development Command and Systems Command). *See* John W. Wright (ed.), *The New York Times Almanac*, 148-49 (2004 ed.). Major sites of economic value include Dulles International Airport, Ronald Reagan National Airport, the Metro system, the Chesapeake Bay Bridge-Tunnel, the ports of Hampton Roads and the Newport News shipyard. Sites of notable symbolic value include the many settings associated with our Nation's founding, including Mount Vernon, Monticello, Montpelier and Colonial Williamsburg.

Founders. Thus, notwithstanding the exigencies of today, Virginia remains highly skeptical of any activity that might be used tomorrow to undermine the individual liberties guaranteed to Americans by the Bill of Rights. Our heritage requires nothing less.

Throughout the history of our Nation, two fundamental aspirations have existed in tension with one another. We demand liberty; we expect government to refrain from oppressive intervention in the lives of individual citizens. And we expect security; we demand that our leaders confront and defeat threats against us from our enemies. This case, like others born in difficult times from the tension between these two aspirations, calls for a careful and delicate balance and for the discovery of avenues by which our National Government can effectively protect its citizens from attack, without compromising the individual rights promised them by the Constitution.

Committed to the preservation of both liberty and security, Virginia offers the Court this brief amicus curiae, supporting the United States, albeit with an alternative analysis that would lead to a limited ruling. The court of appeals instructed the district court to issue a writ of habeas corpus directing the Secretary of Defense to release Jose Padilla, an enemy combatant, from military custody. This judgment should be reversed. It is our belief, however, that this case can – and should – be resolved in a manner that upholds the seizure and detention of Padilla without creating a precedent that might – in different times and in different hands – be used in a manner destructive of our liberties.

SUMMARY OF ARGUMENT

The Court should uphold the seizure and detention of Jose Padilla as an enemy combatant. Given the facts of this case, the Court may do so without reaching the difficult constitutional issue of whether the President has authority to seize and detain alleged enemy combatants who are citizens of the United States *and* at-large within the country at the time of their seizure.

First, Padilla is an enemy combatant who was under surveillance by United States officials while in Pakistan, a country which, for purposes of presidential authority, must be considered part of the theater of operations in the war against Al Qaeda. Thus, the President would have been within his authority to order him seized there. Arguably this factor alone would be sufficient to justify his subsequent seizure and detention on American soil; however, given the other facts of this case, it is not necessary to go so far in order to rule in favor of the United States.

Second, while Padilla was not seized within Pakistan, he was followed by officers of the United States government as he sought to return to the United States, a circumstance analogous to "fresh pursuit." Such pursuit forecloses any argument that presidential authority to seize Padilla vanished upon his departure from Pakistan. Moreover, it would make no sense to allow seizure of an enemy combatant while he is still on foreign soil, but to prohibit such seizure when that same combatant leaves that country to bring the war to our homeland.

Third, Padilla was seized while attempting to re-enter the United States at an international airport, a venue that is the functional equivalent of the border, where constitutional rules of search and seizure have long been held to

vest government officials with enhanced authority. Given Padilla's status as an enemy combatant, the fact that he was seized at the border while seeking to re-enter the country should be sufficient to justify presidential authority, even if he had not been in Pakistan or pursued by federal agents during his return from that country.

Finally, while the initial seizure of Padilla was under a material witness warrant, rather than presidential directive, Padilla was never at-large within the country following his return from Pakistan. The authority of the President to seize him as an enemy combatant is undiminished by the initial use of an alternative method of seizure.

ARGUMENT

When this case came before the court of appeals, the question decided was a broad one – whether the President possesses authority "to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat." *Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2nd Cir. 2003) (Pet. App. 2a). A similarly broad question is now before this Court. *See* Pet. for Cert. at I. While the Court may choose to give an equally broad answer, Virginia writes to point out that the Court need not do so. The Court may – and should – uphold the seizure and detention of Padilla on the narrower grounds suggested by the particular facts of this case.

1. The President Had Authority to Seize Padilla as an Enemy Combatant While Padilla Was in Pakistan.

The war on terror is unlike any other conflict that our Nation has confronted. It is a conflict "waged less against nation-states than against scattered and unpatriated forces." *Hamdi v. Rumsfeld,* 316 F.3d 450, 464 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004). Yet, "neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the war-making authority entrusted to the executive and legislative branches." *Id.* In such a conflict, it is difficult to define exactly where the theater of operations begins and where it ends. However, to the extent that any such distinction may remain legally relevant, the country of Pakistan must be considered part of the theater of operations in the war with Al Qaeda.

Pakistan is, of course, geographically adjacent to Afghanistan, where the United States fought and removed the Taliban regime that gave Al Qaeda a haven for its operations. In the spring of 2002, the United States government advised that "the top leadership of Al Qaeda and as many as 1,000 non-Afghan fighters [were] regrouping in northwestern Pakistan, in the lawless tribal area just over the border with Afghanistan."[3] At the same time, Pakistan advised that "Qaeda leaders have filtered into its cities, and that the terror network's next phase of the

[3] Andrea Kannapell, *Front Lines*, N.Y. TIMES, June 2, 2002, § 4, p. 2.

conflict may center on Pakistan.'"[4] Among the Al Qaeda leaders who moved their operations into Pakistan were Osama Ben Laden, head of the terrorist organization;[5] Khalid Sheik Mohammed, an ethnic Pakistani believed to have masterminded the attacks of September 11;[6] as well as Abu Zubaydah, the Al Qaeda chief of military operations.[7]

Captured inside Pakistan in March 2003, Khalid Sheik Mohammed was later identified by United States officials as the person seen on videotape executing Wall Street Journal reporter Daniel Pearl, in Pakistan, in January 2002.[8] Zubaydah was captured inside Pakistan on March 28, 2002, in a raid conducted by Pakistani police in

[4] *Id. See also* Statement of Gen. John Abizaid, U. S. Army Central Command, to the House Armed Services Committee, Mar. 3, 2004 (noting that Pakistan is "where many Al Qaida and Taliban leaders and forces settled following major combat operations in Afghanistan" and that Pakistan is among the states in the region "most vulnerable to extremism" by organizations seeking to "indoctrinate the youth to violent Jihad as the principle means of advancing their cause.")

[5] *See, e.g.,* Indira A. R. Lakshmanan, *Fighting Terror/The Military Campaign; Pakistan Said Still to Aid Al Qaeda*, BOSTON GLOBE, Mar. 25, 2002, at A1 (quoting the post-Taliban Afghan government as "100 percent sure" that Osama Ben Laden fled into Pakistan); *Germans Swoop on Islamic Group*, BIRMINGHAM POST [United Kingdom], April 24, 2002, at 9 (reporting that Osama Ben Laden is "thought to be safe in Peshawar, [Pakistan], where he remains a hero to most people.").

[6] Dan Eggen, *U.S.: 9-11 Mastermind Killed Reporter*, HOUSTON CHRONICLE, Oct. 22, 2003, at A1.

[7] Philip Shenon and Neil A. Lewis, *A Nation Challenged: Captives; U.S. Says a Key Detainee Had Planned More Attacks*, N.Y. TIMES, April 3, 2002, at A12.

[8] Dan Eggen, *U.S.: 9-11 Mastermind Killed Reporter*, HOUSTON CHRONICLE, Oct. 22, 2003, at A1.

conjunction with agents of the Central Intelligence Agency and the Federal Bureau of Investigation.[9] At the time of his capture, Zubaydah was "organizing new attacks on U.S. targets," according to U.S. officials.[10] Thus, at least in late 2001 and well into 2002, if not currently, Pakistan must be regarded as part of the theater of operations for this unusual war against a terrorist network.

It was later determined that one Al Qaeda plan being orchestrated by Zubaydah involved Padilla. Early in 2002, it was Zubaydah who directed Padilla to "travel[] to Karachi, Pakistan to meet with senior Al Qaeda operatives to discuss Padilla's involvement and participation in terrorist operations targeting the United States . . . [including] the noted 'dirty bomb' plan . . ." Mobbs Declaration, ¶ 9 (Pet. App. 170a). At the time Zubaydah was captured, several other Al Qaeda operatives were captured as well.[11] Padilla was not among them. Yet, whether among the operatives seized at Zubaydah's capture, or tracked down later, there is no doubt that he could have been seized as an enemy combatant in Pakistan, notwithstanding his United States citizenship.

Because Pakistan was part of the theater of operations, the President had full authority under United States law to seize any enemy combatant who was present in that country. *See Duncan v. Kahanamoku,* 327 U.S. 304, 313-14 (1946) (there is a "well-established power of the

[9] Philip Shenon and Neil A. Lewis, *A Nation Challenged: Captives; U.S. Says a Key Detainee Had Planned More Attacks*, N.Y. TIMES, April 3, 2002, at A12

[10] *Id.*

[11] *Id.*

military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war."). "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front. . . ." *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946).

More importantly, the fact that Padilla was blessed with United States citizenship does not change the result. "One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such." *Hamdi*, 316 F.3d at 475.[12] This is so for three reasons: First, the President, in the exercise of his authority as Commander-In-Chief, U.S. Const. Art. II, § 2, cl. 1, can seize any enemy combatant, including those who are United States citizens, when they are *outside* the United States.[13] *See Hamdi*, 316 F.3d at 475 ("At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there."). As this

[12] Of course, the fact that Padilla is an American citizen means that he is entitled "to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches." *Hamdi*.

[13] Because one who is seized at the border may be deemed outside the United States, this Court need not address the more troublesome issue of whether the President can seize an enemy combatant, who is also a United States citizen, within the United States. *See infra* at 14. Thus, *both* Padilla and Hamdi were outside of the United States when they were seized.

Court explained more than sixty years ago, "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency." *Ex Parte Quirin*, 317 U.S. 1, 37 (1942).

Second, contrary to the reasoning of the court below, the Non-Detention Act, 18 U.S.C. § 4001, does not limit the President's authority to seize enemy combatants who also happen to be U.S. citizens.[14] *Hamdi*, 316 F.3d at 467-68. A statute must be read in its entirety. *See, e.g., King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (noting "the cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context"). Although the first subsection of the Non-Detention Act purports to require congressional authorization to seize U.S. citizens, 18 U.S.C. § 4001(a), the remaining subsection makes it clear that the act is limited to the seizure and incarceration of civilians and

[14] The Non-Detention Act provides:

> (a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
>
> (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended[,] and the applicable regulations.
>
> (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

18 U.S.C. § 4001.

does not extend to enemy combatants. *See* 18 U.S.C. § 4001(b) (discussing the control and management of federal penal institutions). Indeed, the remaining subsection, by its very terms, explicitly excludes "military and naval institutions" such as the facility where Padilla is being held from the scope of the Non-Detention Act. *See* 18 U.S.C. § 4001(b)(1). Moreover, when Congress enacted the Non-Detention Act in 1971, it surely knew of this Court's 1942 decision in *Quirin*. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 699 ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with . . . important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them."). "If Congress had intended to override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit." *Hamdi*, 316 F.3d at 468.

Third, even if the Non-Detention Act were otherwise applicable, Congress has subsequently authorized the President to seize enemy combatants who are also United States citizens. Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." *Authorization for Use of Military Force,* Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). As the Fourth Circuit noted, "capturing and detaining enemy combatants is an inherent part of warfare; the 'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed

against our troops." *Hamdi*, 316 F.3d at 467. Additionally, Congress has provided funds for the housing and care of persons "similar to prisoners of war." 10 U.S.C. § 956(5). "It is difficult if not impossible to understand how Congress could make appropriations for the detention of persons 'similar to prisoners of war' without also authorizing their detention in the first instance." *Hamdi*, 316 F.3d at 467-468.

In sum, this Court need not resolve all the fine points of the interplay between the inherent powers of the Commander-in-Chief, the Due Process Clause, the Non-Detention Act and the 2001 Authorization for Use of Military Force. What is plain is that the President had authority to seize Padilla as an enemy combatant while Padilla was in the country of Pakistan.

2. Presidential Authority to Seize Padilla as an Enemy Combatant Remained Intact When Padilla Left Pakistan for the United States.

As Virginia has shown, the President had authority to seize Padilla as an enemy combatant while he was in Pakistan. Under the facts of this case, this authority did not vanish when Padilla left Pakistan en route for the United States. Surely, it would defy common sense to conclude that there was authority to seize him as long as he remained in Pakistan, merely planning an attack against the United States, but that the authority evaporated as soon as he left that country and headed toward his target on a mission of "reconnaissance and/or other attacks on behalf of Al Qaeda." Mobbs Declaration, ¶ 10 (Pet. App. 170a).

Additional support for continuation of presidential authority can be found, by analogy, in the common law doctrine of "fresh pursuit." Broadly speaking, this doctrine enlarges the authority of an officer so as to permit him to seize a suspected felon who has traveled outside the geographic borders by which the officer's authority is ordinarily bounded. Thus, even if the President's authority to seize Padilla as an enemy combatant were ordinarily limited to the theater of operations (an issue the Court need not decide), Padilla's departure from Pakistan does not necessarily defeat the authority of the President to seize him. This is especially so given that the time between Padilla's departure from Pakistan and his seizure at O'Hare International Airport was only a matter of hours, not weeks. *See Padilla*, 352 F.3d at 699 (Pet. App. at 4a) (noting that "[o]n May 8, 2002, Jose Padilla . . . flew . . . from Pakistan, via Switzerland, to Chicago"). Such a period is not so long as to dissipate the freshness of the pursuit. It is also worth noting – though not critical to the fresh pursuit analogy – that federal agents physically followed Padilla during his journey back to the United States.[15]

This conclusion is not altered by the fact that the pursuit of Padilla was undertaken in a manner calculated not to alert him prematurely to the presence of federal agents. The doctrine of fresh pursuit does not require the

[15] *See* James Risen and Philip Shenon, *Traces of Terror: The Investigation; U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1 (noting that F.B.I. agents secretly boarded Padilla's flight from Zurich to the United States to keep him under surveillance).

officer who leaves his jurisdiction to set up a hue and cry or otherwise warn his quarry that he is being pursued. *See Illinois v. Wolfbrandt*, 469 N.E.2d 305, 310 (Ill. App. 1985) (rejecting argument "that there was no fresh pursuit because [defendant] was not fleeing from his pursuers, and in fact, he was never aware of the officers behind him.") (applying Missouri Fresh Pursuit Law), *rev'd on other grounds by Daley v. Hett*, 495 N.E.2d 513, 516 (Ill. 1986).[16] Indeed, in pursuing terrorists across

[16] Additionally, sixteen States have adopted the Uniform Act on Fresh Pursuit, codifying the common law authority of an officer to pursue a suspect outside of the officer's jurisdiction. None of those statutes have defined "fresh pursuit" to require knowledge by the suspect that he is being pursued. *See* CAL. PENAL CODE § 852-.4 (2004); IDAHO CODE § 19-701-07 (2004); IND. CODE ANN. § 35-33-3-1-7 (2004); IOWA CODE § 806.1-.6 (2003); ME. REV. STATE. ANN. tit. 15, § 151-155 (2003); MD. CODE ANN., CRIM. PROC. § 2-304-09 (2003); MASS. ANN. LAWS ch. 276, § 10A-D (2004); MICH. COMP. LAWS § 780.101-08 (2003); MINN. STAT. § 626.65 -72 (2003); MO. REV. STAT. § 544.155 (2004); NEB. REV. STAT. ANN. § 29-416-420 (2003); N.J. STAT. ANN. § 2A:155-1-7 (2004); N.M. STAT. ANN. § 31-2-1-8 (2003); N.Y. CRIM. PROC. LAW § 140.55 (2003); TENN. CODE ANN. § 40-7-201-05 (2003); VT. STAT. ANN. tit. 13, § 5041-45 (2003). *But see*, *Nebraska v. Goff*, 118 N.W.2d 625 (Neb. 1962) (rejecting application of fresh pursuit statute when, *inter alia*, the suspect was unaware he was being pursued and was not seeking to avoid arrest).

A rule that the suspect must be aware of the pursuit could conceivably apply where the pursuit is not across a border, but into a private residence, a venue afforded special protection based on privacy concerns. *See United States v. Santana*, 427 U.S. 38, 43 (1976) (noting that "a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place" and explaining that, in such a context, " 'hot pursuit' means some sort of a chase, but it need not be an extended hue and cry in and about [the] public streets."). Of course, Padilla was seized at an airport, not inside a home, and no purpose would have been served by alerting him to the fact he was on the verge of being apprehended.

international borders, where diplomatic considerations introduce complexities not present in a more domestic context, the need for discretion can be especially compelling.

In sum, once Padilla was subject to seizure as an enemy combatant in Pakistan, he continued to be subject to seizure at every point along his route back to O'Hare International Airport. The authority of the President to seize him was not in any way reduced or eliminated by his movement out of one jurisdiction and into another.

3. The President Has Authority to Seize Enemy Combatants Seeking to Enter the United States at the Border.

The Court may decide the case before it – and uphold the power of the President to seize and detain Padilla – by focusing simply on the fact that Padilla is an enemy combatant captured while attempting to enter the United States at the end of an international flight. Whatever rules may apply to the detention of United States citizens who are seized while at-large within the country, those same rules need not apply to those who are seized while attempting to enter the country at the border.

This Court has long recognized that constitutional rules governing searches and seizures apply differently at the border than they do elsewhere within the country. As this Court explained in *United States v. Ramsey*, 431 U.S. 606, 616 (1977):

> That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur

> at the border, should, by now, require no extended demonstration.

This principle has been applied to justify a wide range of government actions, including actions that would draw condemnation if undertaken within the interior of the country. For example, in *Carroll v. United States*, 267 U.S. 132, 153-54 (1925), this Court said:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

Similarly, this Court has ruled that automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion even if the stop is based largely on ethnicity. *United States v. Martinez-Fuerte*, 428 U.S. 543, 562-563 (1976). Likewise, boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever. *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983). It is not just those traveling by land or sea who are subject to "the longstanding right of the sovereign to protect itself."

Ramsey, 431 U.S. at 616. Those traveling by air are subject to the same right. For a person arriving in the United States on a flight from abroad, the airport is the functional equivalent of the border. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973). *See Ramsey*, 431 U.S. at 616 (defendant arriving at Los Angeles International Airport on direct flight from Bogota, Colombia, treated as if she were crossing an international boundary). Thus, when Padilla flew into O'Hare International Airport, the tarmac on which the plane landed may have been American soil, but Padilla's status was no different than if he were presenting himself for entry at a checkpoint on the Mexican or Canadian border.

The point here is not to suggest that Padilla was arrested for violating an immigration or customs statute, nor does the Commonwealth suggest that immigration or customs searches are the same as the seizure of an enemy combatant. The point is simply that, in keeping with well-established precedent, government actions taken at the border for the purpose of protecting the country are subject to more lenient rules than actions taken in the interior. Thus, the Court need not decide whether the President has a *general* power to detain, as an enemy combatant, a United States citizen seized on American soil. It need only decide that he has the power to seize such an enemy combatant when he is seeking to re-enter the country.

In other words, assuming *arguendo* that the Commander-in-Chief may have greater authority *outside* the country than he has *inside* it, the border need not be treated as if it were on the inside. For the purpose of regulating the seizure and detention of enemy combatants, the border may just as easily be treated as part of the

outside or, at the very least, as a venue falling into a special category of its own. Indeed, given his proximity to the homeland, an enemy combatant seeking to cross the border from abroad is likely to be even more dangerous than he was when he was yet an ocean away. Thus, in the interplay of various constitutional and statutory provisions, the President's authority should be deemed broad enough to justify the seizure and detention of Padilla.

4. The Authority of the President to Order the Seizure of Padilla, as an Enemy Combatant, Is Undiminished by the Initial Use of a Material Witness Warrant.

When Padilla arrived at O'Hare International Airport on May 8, 2002, he was not initially seized by order of the President. He was seized and held by federal marshals, acting pursuant to court order, as a material witness in connection with grand jury proceedings investigating the September 11 attacks. *Padilla*, 352 F.3d at 699 (Pet. App. at 4a). Padilla was thereafter held in custody *continuously* by the Department of Justice through June 9, 2002, when he was turned over to the Department of Defense as an enemy combatant pursuant to presidential order. *Id.* at 699-700 (Pet. App. at 4a-6a).

In other words, following his return from Pakistan, Padilla never achieved full and free entry into the United States and thus, was never at-large within the country. His situation is, therefore, distinguishable from the case of someone who never left the country to consort with Al Qaeda, or who, having left the country, successfully re-entered and returned to the freedom of our streets. These other, hypothetical situations may present questions more difficult than the one presented by the case at hand.

However, such hypothetical questions need not be answered in order to affirm the authority of the President – under the facts of this case – to seize and detain Padilla as an enemy combatant. Because Padilla was in federal custody without interruption, beginning with his seizure at the airport, and because his initial seizure was also related to Al Qaeda activities, the President's June 9 order directing the seizure of Padilla as an enemy combatant "relates back" to the time and place of the airport seizure.

To hold otherwise would split hairs too finely. It would unreasonably restrict the war powers needed by the President to provide for the common defense while doing nothing to protect citizens at-large against any potential abuse of those powers. Indeed, to rule that the power to seize Padilla as an enemy combatant does not relate back to his initial detention may even invite increased use of presidential power. The initial seizure of Padilla as a material witness gave the President time to make a careful, informed and personal judgment about whether Padilla should be held as an enemy combatant. To deprive the President of this time could easily lead to hastier judgments and/or to a delegation of the President's authority to officials closer to the scene, but farther removed from public accountability.

In short, the authority of the President to order the seizure of Padilla, as an enemy combatant, is undiminished by the initial use of a material witness warrant. He was properly seized and is properly detained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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DONALD H. RUMSFELD, *et al.*, Petitioners,
v.
JOSE PADILLA, *et al.*, Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTEREST OF *AMICUS*[1]

Amicus American Center for Law and Justice (ACLJ) is a public interest organization committed to upholding the integrity of our constitutional system of government based on separation of powers. Jay Alan Sekulow, ACLJ Chief Counsel, has argued and participated as counsel of record in numerous cases involving constitutional issues before this Court. ACLJ attorneys have argued numerous cases involving constitutional issues before lower federal courts and state courts throughout the United States. The ACLJ is very concerned about attempts to subvert the well-established authority of the Executive to deal with the exigencies of war in all its facets and to transfer such authority to the criminal justice system and to the Judiciary. Since captured enemy combatants are held in preventive, not punitive, detention as a direct result of their belligerency, neither the domestic law of the United States nor the law of war permits captured enemy combatants—whether foreign nationals or United States citizens—to demand that they be tried in the domestic courts of the Detaining Power. Respondent Padilla is not being detained on criminal charges.[2] Instead, having been

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[1] This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, *amicus* discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] This does not mean that criminal charges cannot be brought. As the Second Circuit aptly noted, there appear to be sufficient grounds to charge Padilla criminally. *See Padilla v. Rumsfeld*, 352 F.3d 695, 699 n.2 (2d Cir. 2003) ("These details should not be read to suggest that Padilla is in fact innocent or that the government lacked substantial reasons to be suspicious of him. *** As is evident from the government investigation, *** the government had ample cause to suspect Padilla of involvement in a terrorist plot."). Yet, during war, there are valid reasons to refrain from

determined by the President of the United States, acting pursuant to his Constitutional authority as Commander-in-Chief, to be an enemy combatant,[3] Padilla is being held in military custody (1) to ensure that he cannot accomplish the mission he was given by *al-Qaeda* operatives to reconnoiter sites within the United States where radioactive "dirty bombs"[4] might be exploded, and (2) to obtain information of intelligence value to thwart such terrorist attacks on targets within the United States. The ACLJ urges this Court to reverse the decision of the Second Circuit.

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prosecuting such an individual criminally and, instead, to detain him in accordance with the law of war. Such reasons include ensuring that he does not rejoin the fight for the duration of hostilities and gathering intelligence. In such situations, the decision as to what to do with such an individual is a political decision to be made by the President without second-guessing by the courts. *See, e.g., Hirabayashi v. United States* , 320 U.S. 81, 93 (1943) ("Where *** the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.").

[3] *See The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (noting that it is the President who determines whether those who threaten the Nation have "the character of belligerents," and, once that determination is made, the courts "must be governed by the decisions and acts of the political department of Government to which this power was entrusted").

[4] A "dirty bomb" is a "conventional explosive such as dynamite packaged with radioactive material that scatters when the bomb goes off. A dirty bomb kills or injures through the initial blast of the conventional explosive and by airborne radiation and contamination ****" *See* Council on Foreign Relations, *Terrorism: Questions and Answers*, available at http://cfrterrorism.org/weapons/dirtybomb.html.

SUMMARY OF ARGUMENT

The underlying facts at issue in this matter are well-known and need little elaboration. On September 11, 2001, the United States was brutally attacked by members of the *al-Qaeda*[5] international terrorist organization.[6] *Al-Qaeda* terrorists hijacked four civilian airliners to use as weapons to attack economic and political targets in the United States. Two airliners were crashed into the World Trade Center towers in New York City. A third airliner was crashed into the Pentagon in northern Virginia. The fourth plane crashed in Pennsylvania when airline passengers thwarted the hijackers' mission. Thousands of United States citizens, as well as hundreds of foreign nationals, were killed in the attacks. The President of the United States took immediate steps as Commander-in-Chief of the armed forces to protect the Nation against further such attacks.

Within days of the attacks, the United States Congress, agreeing with the President that the attacks on the United States constituted acts of war, authorized the President to use military force in response. The President ordered United

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[5] Because Arabic words must be transliterated into English, there are often different spellings. For example, "*al-Qaeda*" is often transliterated as "*al-Qaida*" To avoid confusion, "*al-Qaeda*" will be used in this brief. Where that term is transliterated differently in a source cited in this brief, it will be changed to the above spelling without further notation.

[6] *Al-Qaeda* is "a transnational organization with global ambitions. Its tactics are illegal, but its goals are political. Indeed, they are geopolitical—to drive American influence from the Islamic world, to establish a new caliphate there and to renew the medieval war for dominance between Islam and the West." David B. Rivkin, Jr., et al., *The Law and War*, part 1, WASH. TIMES, Jan. 26, 2004 ("Rivkin1"), at A19. Moreover, on 9-11, "*al-Qaeda* did what few modern states can do—it projected power." *Id.*

States armed forces to seek out and destroy the terrorists responsible for the attacks and those who give them safe haven. Less than one month after the attacks on our soil, United States armed forces took the war to the enemy in Afghanistan. Many members of the *al-Qaeda* terrorist organization and their Taliban allies were killed or captured in the ensuing fight, and the global war on terrorism continues unabated.

The instant matter before this Court concerns Respondent Padilla's challenge to the legality of his detention by United States armed forces. Respondent Padilla, a United States citizen, was arrested in May, 2002, by the FBI as he arrived back in the United States from Pakistan. Intelligence agencies had determined that Padilla, while visiting Afghanistan and Pakistan, had met with senior *al-Qaeda* operatives and had received training in bomb-making. They determined further that Padilla had been sent back to the United States to reconnoiter potential sites to explode a radiological "dirty bomb." *Padilla v. Rumsfeld*, 352 F.3d 695, 699-701 (2d Cir. 2003).

On the basis of this intelligence, President Bush declared Padilla to be an enemy combatant and ordered Department of Justice (DOJ) officials to transfer custody of Padilla to the Department of Defense (DOD). The transfer was accomplished, and Padilla was taken to the Navy brig in Charleston, South Carolina, where he has remained in custody ever since. *Id.* at 700.

Respondent challenges the President's authority to designate him as an enemy combatant to be detained by DOD personnel until the cessation of hostilities in the war on terrorism. Yet, because the United States is in an actual war and because Respondent Padilla was determined by the

President, based on available intelligence, to be an agent of the *al-Qaeda* terrorist organization on a terrorist mission to reconnoiter possible sites to explode a radiological "dirty bomb," domestic criminal law must, under these circumstances, yield to the law of war.[7] The President must be free to carry out his Constitutional obligations to defend the Nation, including detaining United States citizens who, like Respondent, "associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts ****" *See Ex parte Quirin*, 317 U.S. 1, 37-38 (1942).

ARGUMENT

Respondents charge that detaining Respondent Padilla, a United States citizen, in the Navy brig in Charleston, South Carolina—without trial, without access to lawyers, and with no set date for his release—violates numerous constitutional

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[7] *See, e.g., Hirabayashi*, 320 U.S. at 93 (noting that Constitutional war power is "the power to wage war successfully" and that "[w]here *** the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs"); *In re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power *** is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy *** evils which the military operations have produced."); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)) (noting as "obvious and unarguable" that there is no governmental interest more compelling than security of the Nation); William Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (1998), at 222, 224-25 (noting that, in wartime, the balance between freedom and order "shifts in favor of the government's ability to deal with conditions that threaten national well-being" and the laws, though not silent, "speak with a somewhat different voice").

rights, including the rights to due process of law, to a speedy and public trial, and to counsel. *See generally* Brief in Opposition of Respondent, at 19-23. Yet, Respondent is not a criminal suspect. Rather, he is an enemy combatant arrested while entering the United States on a mission for *al-Qaeda* to reconnoiter possible sites to detonate a radiological "dirty bomb." His detention is preventive—to ensure that he does not carry out his assigned mission to terrorize the American public by detonating such a device—not punitive. Hence,

> [t]he most important legal question *** is whether the United States is actually "at war." *** Indeed, much of the opposition to the detentions [of *al-Qaeda* and Taliban members and their confederates] is based on an implicit (or explicit) denial that the United States is engaged in anything other than a new and challenging criminal law enforcement effort, more like "the war on drugs," than Vietnam, Korea, or World War I and World War II.[8]

If the United States is at war, then, pursuant to the law of war, enemy combatants—irrespective of their nationality—may be detained for the duration of hostilities without being charged with any crimes and without access to counsel to challenge the legality of their detention. If, on the other hand, the United States is not at war, then the law of war does not apply, and those detained must be dealt with pursuant to the criminal justice system, with its well-established rights, protections, and obligations.

[8] Rivkin1 at A19; *see also* Petitioner-Appellee-Cross-Appellant Response Brief, at 44 (questioning application of law of war "to the conduct of an international criminal enterprise" and concluding that law of war is not relevant to this matter).

As will be shown *infra*, the United States is actually "at war" in the sense of Vietnam, Korea, and the two World Wars rather than in the sense of "the war on drugs," which is, and always has been, primarily a law enforcement effort. Hence, it is the law of war that governs United States conduct regarding enemy combatants in United States custody, not the United States domestic criminal justice system. Respondent Padilla is being detained as an enemy combatant, not as a criminal suspect. As such, it is the law of war that applies to his detention, not domestic criminal law. The Second Circuit erred in concluding otherwise.

I. THE UNITED STATES IS ACTUALLY AT WAR.

A. Under the Laws of the United States, the Nation Is at War.

Following *al-Qaeda*'s unprovoked attacks on the World Trade Center towers in New York and on the Pentagon in Virginia and the crash in Pennsylvania of a fourth hijacked civilian airliner, President Bush, in his role as Commander-in-Chief, took immediate action to protect the Nation. Those heinous attacks, by themselves, created a state of war between the United States and *al-Qaeda* and its allies, obliging the President, as Commander-in-Chief, to take action.[9] *See The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be

[9] Just as President Roosevelt noted, regarding the Japanese attack on Pearl Harbor, that a state of war existed between the United States and the Empire of Japan *prior to* a formal Congressional declaration of war, *see* http://bcn.boulder.co.us/government/national/speeches/spch.html, so, too, did a state of war exist immediately following the 9-11 attacks upon the United States, despite the lack of Congressional action. *See also The Pedro*, 175 U.S. 354, 363 (1899) (recognizing that war with Spain began prior to an actual declaration by Congress based upon a prior declaration of the Spanish government).

made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."); Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in* 3 *The Founder's Constitution* (Kurland & Lerner eds. 1987) ("when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war"). Further, it is the President, as Commander-in-Chief, who determines whether those who threaten the Nation have "the character of belligerents," and, once that decision is made, the courts "must be governed by the decisions and acts of the political department of Government to which this power was entrusted." *The Prize Cases*, 67 U.S. at 670; *see also In re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power *** is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy *** evils which the military operations have produced.").

The Congress, agreeing with the President that the attacks constituted acts of war, enacted legislation authorizing the President to use military force to respond to the attacks. Pub. L. No. 107-40, 115 Stat. 224 (2001) ("President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons"). This Congressional action constituted a *de jure* authorization of war and ratified the President's actions. *See, e.g., Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) (holding that how Congress gives its consent to engage in war is "a discretionary matter for Congress to decide in which form *** it will give its consent"; "[a]ny attempt to require a declaration of war as the

only permissible form of assent might involve unforeseeable domestic and international consequences"); *see also The Prize Cases*, 67 U.S. at 668; *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (concluding that Congress may authorize use of armed force without a formal declaration of war); *Orlando v. Laird*, 443 F.2d 1039, 1042-43 (2d Cir. 1971) (same); Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in* 3 *The Founder's Constitution* (Kurland & Lerner eds., 1987) ("when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory").

B. Under International Law, the United States Is at War.

The United States military response was not only authorized by the laws of the United States, but by international law as well. *See, e.g.*, U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."). The right of the United States to defend itself was immediately reaffirmed by the UN Security Council in Security Council Resolution 1368, adopted on September 12, 2001. U.N.S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001). Resolution 1368 expressed the Security Council's determination "to combat *by all means* threats to international peace and security caused by terrorist acts." *Id.* (emphasis added).

Consistent with article 51 of the UN Charter, various regional alliances of which the United States is a member have also determined the 9-11 attacks to be acts of war. Accordingly, those regional alliances have invoked the mutual

defense provisions of their respective treaties. In fact, *for the first time in the history of the Alliance*, NATO implemented article 5 of the North Atlantic Treaty, which states "that an armed attack on one or more of [the Allies] in Europe or North America shall be considered an attack against them all." *See* North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243. Article 5 specifically authorizes the "use of armed force" as a means to deal with such attacks on member states. *Id.*

Similarly, the United States and Australia invoked, *for the first time in the history of the ANZUS Pact*, article IV of the ANZUS Treaty, which reads, in pertinent part: "Each Party recognizes that an armed attack *** on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger ****" *See* Security Treaty Between Australia, New Zealand and the United States of America, Sept. 1, 1951, 131 U.N.T.S. 83, 86; Press Release Announcing Application of the ANZUS Treaty, Sept. 14, 2001.[10]

Likewise, on September 21, 2001, the Foreign Ministers of the Organization of American States adopted a resolution recognizing that the attacks on the United States were also attacks against all American states that triggered the reciprocal assistance provision of the Rio Pact. *See* Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3(1), 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 95; OAS Resolution on Terrorist Threat to the Americas, OEA/Ser.F/II.24, RC.24/RES.1/01, Sept. 21, 2001.[11]

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[10] *Available at* www.patriotresource.com/wtc/intl/0914/australia.html.

[11] *Available at* www.yale.edu/lawweb/avalon/sept_11/oas_0921a.htm.

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Clearly, the events of 9-11 marked the entry of the United States into the war on terrorism every bit as much as the events of December 7, 1941, marked America's entry into the Second World War. The President, the Congress, U.S. allies, and key international bodies have all recognized that the attacks on the United States were acts of war and have responded accordingly.[12] Yet, despite the foregoing, the Second Circuit panel ruled that Respondent Padilla must be released from military custody and that he must be afforded the myriad rights and protections of the United States criminal justice system, thereby wrongly substituting its judgment for the judgment of the Executive and Legislative Branches on a question dealing with national security affairs. *See* discussion at Section III, *infra*.

II. ARMED HOSTILITIES TRIGGER APPLICATION OF THE LAW OF WAR.

Under international law, the existence of armed conflict is sufficient to trigger the law of war and its rules for dealing with belligerents. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), Aug. 12, 1949, art. 2, 6 U.S.T. 3316, T.I.A.S. 3364. And, part and parcel of any war is the capture and detention of enemy combatants. In fact,

> [t]he right to detain enemy combatants during wartime is one of the most fundamental aspects of the customary laws of war and represented one of the first great humanitarian advances in the history of armed conflict. *** [T]he right to detain enemy combatants in wartime is

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[12] Rivkin1 at A19.

> so basic that it has rarely been adjudicated [in U.S. courts.] *** It is an inherent part of the president's authority as commander-in-chief, and was well-known to the Constitution's framers. Alexander Hamilton addressed this very point in 1801 **** Hamilton noted that "[w]ar, of itself, gives to the parties a mutual right to kill in battle, and to capture the persons and property of each other" and that the Constitution does not require specific congressional authorization for such actions, at least after hostilities have commenced. Indeed, he wrote, "[t]he framers would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and convenience."[13]

Further, this Court has held that United States citizens who take up arms against the United States on behalf of a foreign power may also be detained as enemy combatants. *Ex parte Quirin*, 317 U.S. at 30-31; *see also In re Territo*, 156 F.2d 142 (9th Cir. 1946). In *Ex parte Quirin*, this Court determined that captured Nazi saboteurs, including a United States citizen, were properly declared to be unlawful combatants who could lawfully be tried by Military Commission and executed for their unlawful belligerency. 317 U.S. at 37-38.

Given the existence of armed hostilities and Respondent Padilla's involvement in a terrorist plot, planned and directed by *al-Qaeda* operatives, to detonate a dirty bomb in the United States, the President acted properly in declaring

[13] David B. Rivkin, Jr., et al., *The Law and War*, part 2, WASH. TIMES, Jan. 27, 2004, at A19 (quoting Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in* 3 *The Founder's Constitution* (Kurland & Lerner eds., 1987)).

Padilla to be an enemy combatant[14] and in ordering him to be detained by the armed forces of the United States. *See* GPW art. 39 (requiring that captured enemy combatants be detained in locations "under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power"); *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (characterizing "as 'well-established' the power of the military to exercise jurisdiction over *** enemy belligerents, prisoners of war, or others charged with violating the laws of war"). The Second Circuit panel clearly erred in ordering Respondent released from military custody under these circumstances.

III. THE PRESIDENT'S DECISIONS REGARDING PADILLA ARE NONJUSTICIABLE POLITICAL QUESTIONS.

"It is well established that the federal courts will not adjudicate political questions." *Powell v. McCormack*, 395 U.S. 486, 518 (1969). "[I]t is the relationship between the Judiciary and the coordinate branches of the Federal Government *** which gives rise to the 'political question,'" *Baker v. Carr*, 369 U.S. 186, 210 (1962), and the "nonjusticiability of a political question is primarily a function of the separation of powers." *Id.* "Restrictions derived from the separation of powers doctrine prevent the

[14] In fact, Padilla is an "unlawful" enemy combatant, since he "without uniform" entered the United States "for the purpose of waging war by destruction of life or property." *See Ex parte Quirin*, 317 U.S. at 31. To be a lawful combatant, one must meet the four rules laid down in the 1907 Hague Convention: (1) have a responsible command structure; (2) wear a fixed distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) operate in accordance with the laws and customs of war. *See* Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907), art. 1. Respondent met none of them.

judicial branch from deciding 'political questions,' controversies that revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches." *Aktepe v. United States*, 105 F.3d 1400, 1402 (11th Cir. 1997) (citing *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). Further, "[s]eparation of powers is a doctrine to which the courts must adhere even in the absence of an explicit statutory command." *Id.* at 1402 (citing *Tiffany v. United States*, 931 F.2d 271, 276 (4th Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992)).

Foreign policy and military affairs figure prominently among the areas where the political question doctrine has been implicated. *See, e.g., Haig v. Agee*, 453 U.S. 280, 292 (1981) ("matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); *Aktepe*, 105 F.3d at 1403 (finding that political branches are accorded high degree of deference in area of military affairs). The Constitution commits the conduct of foreign affairs and national security to the legislative and executive branches of government. *See, e.g., Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *Johnson*, 339 U.S. at 786.

In *Baker v. Carr*, 369 U.S. 186 (1962), this Court identified six hallmarks of political questions, any one of which is sufficient to carry a controversy beyond justiciable bounds:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. As shown *infra*, the issues before this Court independently meet each of the six hallmarks of nonjusticiable political questions, thereby precluding this, or any other, court from granting the relief sought by Respondents.

A. The Constitution Commits the Issues of Foreign Policy and National Security to the Legislative and Executive Branches.

The Constitution commits the issues raised in this matter to the political branches of government. *See, e.g.*, U.S. Const. art. I, § 8, cls. 11-16 (granting Congress the power to declare war and to provide for, organize, maintain, and govern the military); U.S. Const. art. II, § 1, cl. 1 (conferring on the President the "executive power"); U.S. Const. art. II, § 2, cl. 1 (providing that the President shall be the Commander-in-Chief of the armed forces); *Oetjen*, 246 U.S. at 302 (the Constitution commits the conduct of foreign affairs to the executive and legislative branches); *The Prize Cases*, 67 U.S. at 670 (when the President is acting as Commander-in-Chief, courts must recognize that it is the President who "determine[s] what degree of force the crisis demands" as well as whether those who threaten the Nation have "the character of belligerents"); *Haig*, 453 U.S. at 307 (concluding that foreign policy and national security overlap and "cannot neatly be compartmentalized").

"The Supreme Court has repeatedly recognized that the President is the nation's 'guiding organ in the conduct of our foreign affairs,' in whom the Constitution vests 'vast powers in relation to the outside world.'" *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1313 (11th Cir. 2001) (quoting *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948), and citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) ("recognizing 'the generally accepted view that foreign policy is the province and responsibility of the Executive'") (citation omitted)); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. *** 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'") (quoting 6 Annals of Congress 613 (1816)).

The President also has broad authority as Commander-in-Chief. As this Court noted in *Hirabayashi*:

> The war power of the national government is "the power to wage war successfully." *** *It extends to every matter and activity so related to war as substantially to affect its conduct and progress.* *** It embraces every phase of the national defense **** Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them *wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the means for resisting it.* *** Where *** the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the

> Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

320 U.S. at 93 (internal citations omitted) (emphasis added).

The underlying events in this matter stem from the United States' response to the 9-11 terrorist attacks perpetrated on our soil. The United States response involves both foreign policy and national security components. Militarily, the President, with the explicit approval of the Congress, *see* Pub. L. No. 107-40, 115 Stat. 224 (2001) ("President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons ****"), ordered the armed forces of the United States into action to seek out and destroy the terrorists and those who succor them. This led to active hostilities in Afghanistan aimed at destroying the *al-Qaeda* terrorist organization and the Taliban regime which gave the terrorists safe haven.

Since hostilities began, United States agencies and armed forces have been identifying, capturing, and taking into custody members of the *al-Qaeda* terrorist organization and their supporters—including Respondent Padilla in this matter. And, due to the demonstrated suicidal nature of the 9-11 terrorist acts and the *kamikaze* philosophy that motivates many of the captured enemy combatants,[15] the President has

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[15] *See, e.g.*, www.latimes.com/news/nationworld/world/la-092401alqaeda.story ("[*Al-Qaeda* members'] commitment is unyielding. They film their own suicide videos before they hop into Toyota pickup trucks loaded with hundreds of pounds of TNT, turn on audio cassettes chanting praise to those who will die for the cause, and blow themselves to bits to

determined that special security measures must be used to detain them. Such decisions are political decisions which implicate both the national security and foreign policies of the United States, whose execution rightly resides in the political branches. The Judiciary is ill-equipped to determine the possible impact of such decisions on the wartime foreign and national security policies of the Nation and should be wary of entering the realm of discretionary decision-making reserved to the President. *See Johnson*, 339 U.S. at 786 (characterizing "as 'well-established' the power of the military to exercise jurisdiction over *** enemy belligerents, prisoners of war, or others charged with violating the laws of war"). The Second Circuit panel inappropriately entered the political realm when it substituted its judgment that Respondent was not an enemy combatant subject to detention under the law of war for the President's contrary determination.[16]

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weaken the social foundation of their worst enemy: the United States.").

[16] For example, the Second Circuit panel majority concluded—despite the vicious 9-11 attacks on United States soil which led to deaths of thousands—that Respondent could not be designated as an enemy combatant and be detained by the United States armed forces because United States soil is "outside a zone of combat." *Padilla*, 352 F.3d at 698, 724. Yet, determining whether the United States is "outside a zone of combat" is itself a political decision, not a judicial decision. *See id.* at 728 (Wesley, J., concurring in part and dissenting in part) (questioning the majority's reasoning regarding "zone of combat" and who has the authority to define what a "zone of combat" is or "to designate a geopolitical area as such"). Moreover, the Second Circuit panel majority distinguished this case from the *Hamdi* case, *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003), by noting that Padilla was not arrested "on a foreign battlefield or while actively engaged in armed conflict against the United States," *Padilla*, 352 F.3d at 711, implying that the President may, in fact, detain United States citizens as enemy combatants if arrested "inside" a zone of combat or if actively engaging in armed conflict. Yet, entering the United States on a mission to engage in hostile action (detonate a dirty bomb), even though stopped before it could be accomplished, does not make one any less an enemy combatant under the law of war. In such circumstances,

B. This Matter Lacks Judicially Discoverable and Manageable Standards.

No judicially discoverable and manageable standards exist for resolving the questions raised by the detention of the extremely dangerous enemy combatants in the war on terrorism. Decisions about prosecuting a war and dealing with captives must often be made on an *ad hoc* basis, depending on unique, often unpredictable, circumstances. Respondent Padilla is an enemy combatant who returned to the United States for the purpose of engaging in terrorist acts on United States soil. The day-to-day prosecution of war and decisions related directly thereto, such as the status and care of captured enemy combatants, rightly reside with the President in his capacity as Commander-in-Chief. *See, e.g., Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919) (concluding that war power includes power "to remedy the evils which have arisen from [a conflict's] rise and progress") (quoting *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870)); *In re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power *** is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy *** evils which the military operations have produced.") (citing *Stewart*, 78 U.S. at 507). Given the unique events of 9-11 and the unique nature of the war on terrorism, the President

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the President is concerned with *preventing* such acts—he is not concerned in such a situation with vindicating our criminal justice system and punishing the offender, nor should he be. Moreover, regarding the events of 9-11, the President and the Congress are agreed that our enemies must be hunted down and defeated, wherever they may be found, including within the United States. *See* Pub. L. No. 107-40, 115 Stat. 224 (2001). Thus, the President's power is at its zenith. *Padilla*, 352 F.3d at 711 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

deserves the latitude and benefit of the doubt as he seeks to grapple with a heretofore unknown situation and to develop effective policies to restore peace.[17]

Despite the unique nature of the war on terrorism, the Second Circuit majority refused to defer to the President's judgment in this matter and substituted its own opinion about how best to deal with United States citizens who return home to engage in terrorist acts on behalf of an enemy power.[18] Not only are persons like Respondent especially dangerous (since they can "hide" in plain view in American society), but such persons, when apprehended, may be treasure troves of vital intelligence information needed by the President to thwart other terrorist attacks. Hence, detaining such persons as enemy combatants under the law of war better serves the security interests of the United States than trying them for

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[17] *See* www.whitehouse.gov/news/releases/2001/09/20010913-12.html (When asked whether there can be a war without a formal enemy, White House Press Secretary Ari Fleischer replied: "[A]s the President has indicated, this is a different type of enemy in the 21st century. The President said, this enemy is nameless; this enemy is faceless; this enemy has no specific borders. *** It is a different type of enemy ****").

[18] In fact, the panel majority blithely dismissed the concerns about the dangers posed by Padilla by noting that, when he was being held under the control of the Bureau of Prisons, "[a]ny immediate threat he posed to national security had effectively been neutralized." *Padilla*, 352 F.3d at 700; *see also id.* at 715 n.24 (suggesting that "criminal mechanisms" exist to deal with "imminent acts of belligerency on U.S. soil"). Such reasoning, of course, does not take into account the President's responsibility to *prevent* attacks. Hence, such reasoning effectively precludes the possibility of intelligence gathering, since persons held in criminal custody enjoy the full panoply of rights under the criminal justice system, whereas persons held under the law of war do not. The panel majority recognized, but dismissed, this fact. *Id.* at 699 ("Under *any* scenario, Padilla will be entitled to the constitutional protections extended to other citizens." (emphasis added)).

violations of the United States criminal code. Such policy decisions rightly reside with the President as Commander-in-Chief, not with the courts. Moreover, the President and the Congress are in agreement here. *See* Pub. L. No. 107-40, 115 Stat. 224 (2001). Further,

> [t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. *But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial.* Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. *They are delicate, complex, and involve large elements of prophecy.* They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. *They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.*

Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (citing *Coleman v. Miller*, 307 U.S. 433, 454 (1939); *Curtiss-Wright*, 299 U.S. at 319-21; *Oetjen*, 246 U.S. at 302) (emphasis added).

Additionally, unlike in previous conflicts, many of the detainees in this conflict appear to possess a zeal for suicidal

attacks on Americans. This mindset makes the situation especially dangerous, and special measures and caution are called for. Such policy decisions are for the President and Congress to make, not the courts.

Given the unique nature of this war, a serious rethinking of how to handle such captives is required, and such rethinking involves the formulation and subsequent implementation of national policy to deal with such persons, clearly political matters reserved to the political branches, not the courts.

C. It Is Impossible to Decide This Matter Without an Initial Policy Determination of a Kind Clearly For Nonjudicial Discretion.

The President, as Commander-in-Chief, is charged with responsibility for prosecuting the ongoing war on terrorism, and this Court has noted as "obvious and unarguable" that there is no governmental interest more compelling than security of the Nation. *Haig*, 453 U.S. at 307 (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)); *accord Cole v. Young*, 351 U.S. 536, 546 (1956). Part and parcel of any resort to war is the issue of what to do with enemy combatants who may fall into United States hands. That is a political question which implicates a whole host of matters, such as, how to ensure that such persons are no longer able to take up arms against U.S. forces or harm their captors, how to ensure that perpetrators of war crimes are properly identified and punished, how to ensure that information of intelligence value is timely obtained, and so forth.

Enemy belligerents are detained, not based on probable cause or other important domestic constitutional principles, but because of their armed belligerency, capture, and

continuing threat to American interests. *Their detention, therefore, is preventive rather than punitive*. As mentioned earlier, there is an additional dynamic with the *al-Qaeda* captives—their willingness to be suicidally aggressive. This makes them especially dangerous because they may kill without compunction or hesitation. As such, the President is faced with a heretofore unknown and extremely grave situation, and it is his responsibility to formulate and implement policies to protect and defend the United States. It falls to the President to orchestrate national policy and balance benefits and risks. He both needs and deserves the latitude to develop such policies without undue interference by the Judiciary which, in any case, lacks the competence to deal with such situations. Moreover, to use Justice Goldberg's oft-quoted phrase, the Constitution "is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

The prosecution of a war involves both foreign policy and national security issues which generally fall outside the realm of judicial competence.

> [I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

People's Mojahedin Organization of Iran v. United States Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (quoting *Chicago & Southern*, 333 U.S. at 111). The same is true for military decisions. *See, e.g., Hirabayashi*, 320 U.S. at 93 (noting the wide discretion given the political branches in

dealing with war issues and recognizing that courts should not substitute their judgment for that of the political branches).

Respondent Padilla returned to the United States to engage in terrorist activities here. The President, as Commander-in-Chief, has determined that it is more important to national security to place him in preventive custody pursuant to the law of war than to punish him for any criminal acts. That is a political determination. The Second Circuit erred in substituting its opinion for the President's.

D. It Would Be Impossible to Undertake Independent Resolution Without Expressing Lack of Respect Due Coordinate Branches of Government.

Adjudicating this matter would express a lack of respect for the political branches of government by subjecting their discretionary military and foreign policy decisions to judicial scrutiny, notwithstanding the Judiciary's relative lack of expertise in such areas. The United States was attacked by international terrorists on 9-11. The President, in his role as Commander-in-Chief, took immediate action to protect the Nation. The Congress, agreeing with the President that the attacks on the Nation constituted acts of war, enacted legislation authorizing the President to use military force to respond to the attacks. Pub. L. No. 107-40, 115 Stat. 224 (2001). This Congressional action constituted a *de jure* authorization of war. *See Mitchell*, 488 F.2d at 615 (holding that how Congress gives its consent to engage in war is "a discretionary matter for Congress to decide in which form *** it will give its consent ***"; "Any attempt to require a declaration of war as the only permissible form of assent might involve unforeseeable domestic and international consequences. ***"); *see also The Prize Cases*, 67 U.S. at 668 ("If a war be made by invasion of a foreign nation, the

President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."); *Luftig v. McNamara*, 373 F.2d 664, 665-66 (D.C. Cir.) (per curiam), *cert. denied*, 387 U.S. 945 (1967) ("The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.").

The prosecution of war includes the capture and detention of enemy belligerents. Detaining enemy combatants is a political matter, and allowing enemy combatants to challenge the legality of their detention in the domestic courts of the detaining power would "bring aid and comfort to the enemy" and would constitute "a conflict between judicial and military opinion highly comforting to enemies of the United States." *Johnson*, 339 U.S. at 779. Furthermore, in his June 9, 2002, Order to the Secretary of Defense, the President stated, *inter alia*, the following concerning Respondent: (1) he is an enemy combatant; (2) he is associated with *al-Qaeda*; (3) he engaged in hostile conduct and war-like acts of international terrorism aimed at the United States; (4) he possesses intelligence information about *al-Qaeda* that would help prevent attacks on the United States; (5) he represents a continuing danger to the security of the United States; and (6) it is in the interest of the United States to detain him as an enemy combatant. *Padilla*, 352 F.3d at 724-25. Despite this clear recitation of the rationale for detaining Respondent in military custody as an enemy combatant, the Second Circuit panel majority dismissed the President's reasons and substituted its opinion for the President's.

E. There Is a Need For Unquestioning Adherence to the Political Decision Already Made by the President.

The situation faced by the United States today is without historical precedent. The United States has suffered well-planned, coordinated attacks on the political and economic centers of this Nation. The President, with the explicit concurrence of the Congress, has taken decisive steps to meet the threat and protect the Nation. Such steps should not be subjected to second-guessing by the Judiciary. *See Haig*, 453 U.S. at 307 (concluding it to be "obvious and unarguable" that there is no governmental interest more compelling than security of the Nation) (citing *Aptheker*, 378 U.S. at 509); *accord Cole*, 351 U.S. at 546; *Hirabayashi*, 320 U.S. at 93 (nation's war power is "the power to wage war successfully").

We are facing an enemy which willingly commits the most horrendous, suicidal acts against innocent civilians and which will do so again if it can. Because this situation is without historical precedent, no one can know for sure how much success emerging policies will have. As such, it would be inappropriate for the courts of the United States to enter the political fray and attempt to second-guess the policies adopted by the President to meet this threat.

Any appearance of official opposition to decisions within the discretion of the President will surely bring aid and comfort to the enemy while demoralizing the men and women in the U.S. armed forces who are daily putting their lives at risk to track down and destroy the confederates of those who planned the 9-11 attacks and seek to repeat them. In this case, the President is acting pursuant to his authority as Chief Executive, *see The Prize Cases*, 67 U.S. at 668 ("The Constitution confers on the President the whole Executive

power."); as Commander-in-Chief, U.S. Const. art. II, § 2, cl. 1; and with statutory authority granted by the Congress. Pub. L. No. 107-40, 115 Stat. 224 (2001). Moreover,

> [w]hen the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. *In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation* ****"

Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube*, 343 U.S. at 637 (Jackson, J., concurring)) (emphasis added). Given this agreement between the President and the Congress, the Second Circuit should have upheld the President's action.

F. There Is Potential For Embarrassment From Multifarious Pronouncements by Various Departments on One Question.

The President is Chief Executive of the United States and Commander-in-Chief of its armed forces. U.S. Const. art. II, §§ 1-2. As such, it is his responsibility to make decisions concerning the whole host of issues involved with the building of coalitions and prosecution of the war on terrorism. Those issues include how to treat enemy belligerents taken captive by United States armed forces. This is especially important given the nature of the war and the fact that nationals from countries friendly to the United States are numbered among the enemy combatants being detained by the United States. It is, therefore, necessary that the President have the leeway to deal with United States citizens who have taken up arms against the United States the same as the United States deals with captured enemy combatants from

other nations. Because of the unique nature of this war and the need to maintain coalitions with a broad array of foreign governments, it is necessary for the Nation to speak with one voice. *See*, *e.g.*, *Baker*, 369 U.S. at 211 (recognizing the special importance of our nation speaking with one voice in the field of foreign affairs). It is the Executive who has been given the responsibility to speak for the Nation as a whole, and, given the high stakes involved, the Judiciary must tread lightly so as to avoid undermining the President's ability to successfully prosecute the ongoing war. The issue of the fair and equal treatment of enemy combatants detained by the United States in the war on terrorism is an important and emotional issue for many nations. It is the President who must determine the risks and benefits of national policy, not the courts, and it is in times of grave national crisis and danger that the courts must defer to the elected leaders to craft appropriate policies in the Nation's interest. This is such a time. The Second Circuit erred in substituting its judgment for the President's.

CONCLUSION

For the foregoing reasons, *Amicus* American Center for Law and Justice urges this Court to reverse the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Nos. 03-1027 & 03-6696

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,

Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,

Respondents.

YASER ESAM HAMDI AND ESAM FOUAD HAMDI,

Petitioners,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Second and Fourth Circuits

BRIEF FOR UNITED STATES SENATORS JOHN CORNYN AND LARRY E. CRAIG AS AMICUS CURIAE IN SUPPORT OF DONALD H. RUMSFELD

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QUESTION PRESENTED

This brief will address the following question:

Whether the President, acting pursuant to Congressional authorization to use force in response to the terrorist attacks of September 11, 2001, has the authority to detain two American citizens whom he determined were enemy combatants, presenting ongoing threats to the safety of the United States.

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BRIEF FOR UNITED STATES SENATORS JOHN CORNYN AND LARRY E. CRAIG AS AMICUS CURIAE IN SUPPORT OF DONALD H. RUMSFELD

INTEREST OF THE AMICUS CURIAE[1]

John Cornyn and Larry E. Craig are members of the United States Senate currently serving in the One Hundred Eighth Congress. Senator Cornyn is Chairman of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights. Senator Craig is a member of the subcommittee. The Senators strongly support the Authorization for Use of Military Force joint resolution approved during the 107th Congress by a 98-0 vote in the Senate and a 420-1 vote in the House. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sep. 18, 2001) ("Joint Resolution"). The Senators firmly believe that the Joint Resolution provides ample authorization for the detention of Yaser Hamdi and Jose Padilla as enemy combatants, and that any decision to the contrary by this Court would contradict and undermine that act of Congress.

INTRODUCTION

a. On September 11, 2001, members of the al Qaeda terrorist network launched a treacherous, savage attack on the United States. Four planes were hijacked within one hour. Two struck the World Trade Center in New York City, a third struck the Pentagon in Washington D.C., and a fourth, likely intended for another target in Washington, D.C.,

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[1] Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the amicus, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court.

crashed in a Pennsylvania field due to the heroic efforts of several passengers. Terrorists claimed the lives of approximately three thousand innocent Americans and foreign nationals that tragic morning.

In response to this act of war, President George W. Bush deployed the United States military against al Qaeda and the Taliban regime in Afghanistan, which harbored and supported the terrorists. The President acted pursuant to the Joint Resolution enacted within a week of the September 11 attacks, which authorized the President to use force against any person, organization, or nation responsible for the attacks, or any nation that harbored them. In conjunction with its allies and a coalition of local military groups known as the Northern Alliance, the United States succeeded in driving the Taliban dictatorship from power and restoring a legitimate government to Afghanistan. The broader war against al Qaeda continues to this day.

b. In November 2001, during the course of military operations in Afghanistan, Yaser Esam Hamdi was captured by Northern Alliance troops when his military unit surrendered on the battlefield. Armed with an AK-47 assault rifle at the time of his capture, Hamdi was detained in several military prisons in Afghanistan. Interrogations revealed that Hamdi came to Afghanistan in July or August of 2001, where he became affiliated with a Taliban military unit and received weapons training. Hamdi was eventually transferred from Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba. On April 5, 2002, upon discovering that Hamdi apparently was born in Louisiana and never renounced his U.S. citizenship, officials transferred him to a naval brig in Norfolk, Virginia. The government has provided Hamdi with access to the brig commander and the chaplain, and has recently allowed him to consult with a lawyer under appropriate supervision.

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia filed a writ of habeas corpus as

Hamdi's "next friend," challenging the legality of his detention. The District Court found that the suit was properly brought. *Hamdi* J.A. 113-116. It ordered that Hamdi receive counsel, and that the government provide more evidence that Hamdi's detention was justified. The Fourth Circuit reversed on the narrow ground that the Public Defender's petition was unnecessary because Hamdi's father "was ready, willing, and able to file, and in fact has filed, a petition as Hamdi's next friend." *Hamdi v. Rumsfeld*, 294 F.3d 598, 600 (4th Cir. 2002) (*Hamdi I*). Ruling on the writ of habeas corpus brought by Hamdi's father, the District Court ordered that the Public Defender should have unmonitored access to Hamdi. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002). On appeal, the Fourth Circuit again reversed. *Hamdi v. Rumsfeld*, (4th Cir. 2002) (*Hamdi II*) (*Hamdi* J.A. 332-44). The court reversed the District Court's unwarranted assumption "(1) that Hamdi is not an enemy combatant, or (2) even if he might be such a person, he is nevertheless entitled not only to counsel but to immediate and unmonitored access thereto." *Hamdi* J.A. 340. The Fourth Circuit remanded the petition to the district court so that it could "consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at 343.

On remand, the District Court remained dissatisfied with the government's basis for detaining Hamdi, *see Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002) (*Hamdi* J.A. 282-99), notwithstanding the Declaration submitted by the Special Advisor to the Under Secretary of Defense for Policy (*Hamdi* J.A. 148-150). The Declaration explained the circumstances of Hamdi's capture, and stated that he met the government's screening criteria for those classified as enemy combatants. Dissecting the Declaration line by line, the District Court demanded that the government produce substantial additional information to justify the detention. Once again, the Fourth Circuit reversed. *Hamdi v. Rumsfeld*,

316 F.3d 450 (4th Cir. 2002) (*Hamdi III*) (J.A. 415-55). It held that "the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper, and we remand the case with directions to dismiss the petition." J.A. 418. Over four dissenting votes, the Fourth Circuit denied rehearing *en banc*. *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003) (denial of rehearing *en banc*) (*Hamdi IV*) (J.A. 458-533).

This Court granted certiorari, *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (U.S. Jan. 9, 2004) (No. 03-6696).

c. On May 8, 2002, Jose Padilla flew from Pakistan, via Switzerland, to Chicago O'Hare International Airport. Shortly after exiting the plane, FBI agents arrested him pursuant to a material witness warrant issued by the Chief Judge of the Southern District of New York. The warrant sought to enforce a subpoena requiring Padilla to testify before a grand jury on matters related to September 11. Within one week, Padilla, an American citizen, was transferred to the Metropolitan Correctional Center in New York City, where he was officially under the control of the Bureau of Prisons and the United States Marshall Service.

On May 15, Chief Judge Mukasey appointed Donna R. Newman as Padilla's counsel. On May 22, Newman filed a motion to vacate the material witness warrant. Before the court ruled on the motion, the United States withdrew its subpoena, because the President issued an Order on June 9, 2002, designating Padilla as an enemy combatant and directing Secretary Rumsfeld to detain him. Pursuant to this Order, Padilla was taken into custody by Department of Defense personnel and moved to a naval brig in Charleston, South Carolina.

The President found in his June 9 Order that Padilla "is, and at the time he entered the United States in May 2002

was, an enemy combatant," and that he "represents a continuing, present and grave danger to the national security of the United States." *Padilla* Pet. App. 57a-58a. The Order further stated that "Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war," that he "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism," and that he possesses intelligence that "would aid U.S. efforts to prevent attacks by al Qaeda." *Id.* at 57a.

This Order, in turn, was based on a Declaration of the Special Advisor to the Under Secretary of Defense for Policy. *Padilla* Pet. App. 167a-172a. The Declaration explained that Padilla was born in New York, convicted of murder as a minor, imprisoned on handgun charges after his 18th birthday, and left the United States for the Middle East and Southwest Asia in the late 1990s. At that time, Padilla became closely associated with known members of al Qaeda. While in Afghanistan in 2001, Padilla conspired with al Qaeda members to build and detonate a "dirty bomb" within the United States. He went to Pakistan to receive explosives training from al Qaeda operatives, and subsequently flew to Chicago, where he was arrested.

Four judicial opinions have addressed Padilla's status and legal claims. The first held that court-appointed counsel Donna Newman had standing as "next friend" to bring a habeas petition; that the court had jurisdiction over the matter; that Secretary Rumsfeld was properly named; and that the court would use a "some evidence" standard to determine whether Padilla was validly detained as an enemy combatant. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 569-70 (S.D.N.Y. 2002) (*Padilla I*) (*Padilla* Pet. App. 76a-166a). It also held that Padilla should be permitted to consult with counsel, and gave the parties four weeks to agree upon a mutually satisfactory way to comply with that holding. The government requested reconsideration of the

court's decision, arguing that access to counsel was not legally required and would compromise national security. The court adhered to its original holding. *Padilla ex rel. Newman v. Rumsfeld,* 243 F. Supp. 2d 42, 43-46 (S.D.N.Y. 2003) (*Padilla II*). The government then moved for certification of the ruling in order to pursue interlocutory review on the issues it lost. *See* 28 U.S.C. § 1292(b). The court certified six questions for appeal. *See Padilla ex rel. Newman v. Rumsfeld,* 256 F. Supp. 2d 218, 222-23 (S.D.N.Y. 2003) (*Padilla III*).

On appeal, a divided Second Circuit panel affirmed in part and reversed in part. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (*Padilla IV*) (*Padilla* Pet. App. 1a-75a). The majority first held that the district court properly asserted habeas jurisdiction over the matter. It then noted that "great deference is afforded the President's exercise of his authority as Commander-in-Chief," *Padilla* Pet. App. 30a, and even specifically acknowledged that "the government had ample cause to suspect Padilla of involvement in a terrorist plot," *id.* at 4a n.2. Nevertheless, the majority concluded that the President had no authority to detain Padilla as an enemy combatant. It reasoned that 18 U.S.C. § 4001(a), an obscure statute buried in the "Prisons and Prisoners" section of the United States Code, prohibits the detention of enemy combatants during wartime without express Congressional authorization. *Padilla* Pet. App. 43a-50a. Finding no Congressional authorization despite Congress's sweeping Joint Resolution, the Second Circuit remanded to the district court with instructions to release Padilla from military custody within 30 days. *Id.* at 50a-56a. Judge Wesley dissented from this holding, arguing that, if § 4001(a) is – as the majority claims – "an impenetrable barrier to the President detaining a U.S. citizen who is alleged to have ties to the belligerent and who is part of a plan for belligerency on U.S. soil, then § 4001(a), in my view, is unconstitutional." *Padilla* Pet. App. 74a (Wesley, J., dissenting in part and

concurring in part). He also criticized the majority's "strained reading" of Congress's "strong and direct" Joint Resolution, which, in his opinion, clearly authorized the President to detain enemy combatants. *Id.* The majority's interpretation of the Joint Resolution, he argued, was based on a "false distinction between the use of force and the ability to detain." *Id.* at 70a.

This Court granted certiorari, *Rumsfeld v. Padilla*, __ S. Ct. __, 2004 WL 95802 (U.S. Feb 20, 2004) (No. 03-1027).

SUMMARY OF ARGUMENT

The Fourth Circuit correctly upheld the President's detention of Mr. Hamdi as an enemy combatant. The Second Circuit was wrong to conclude that the President lacked the authority to detain Mr. Padilla as an enemy combatant.

a. The United States is at war. On September 11, 2001, the al Qaeda terrorist organization launched a series of coordinated acts of war against our country. Within days, two events marked Congress's official recognition of a state of war. On September 14, President Bush declared a national emergency in response to the September 11 attacks. This triggered the President's war powers as recognized in section 2(c) of the War Powers Resolution. 50 U.S.C. § 1541(c). And on September 18, Congress approved by overwhelming margins the Joint Resolution, which constitutes the "specific statutory authorization" contemplated by the War Powers Resolution to use "all necessary and appropriate force" against al Qaeda. The Constitution vests the war powers exclusively in the President and Congress. This Court has never contradicted the political branches' determination of a state of war. Nor has it ever questioned Congress's ability to authorize the President to conduct war. The separation of powers and principles of justiciability require that courts leave these questions to the political branches.

b. The President's power to detain enemy combatants falls within the Joint Resolution authorization to use "all necessary and appropriate force." As a matter of text, logic,

and the precedents of this Court, the greater and more deadly power to use lethal military force encompasses the lesser power to detain. A contrary holding would lead to absurd results and perverse incentives, and would upset this Court's tradition of deference to the political branches in times of war.

c. Neither citizenship nor location of capture affects the President's wartime authority to detain enemy combatants. Any other conclusion would offend tradition, *Ex parte Quirin*, 317 U.S. 1, 37 (1942), and logic. Both Hamdi and Padilla fall squarely within *Quirin*, and no other decision of this Court can fairly be read to suggest otherwise.

d. 18 U.S.C. § 4001(a) does not apply to the President's wartime power to detain enemy combatants. Neighboring sections and the entire U.S. Code reveal the provision's limited scope. Moreover, the well-established avoidance canon, which assumes special meaning in the context of foreign affairs, requires that section 4001(a) be given this narrow meaning. And nothing in the legislative history justifies a broader interpretation. Finally, in any event, the Joint Resolution constitutes an "Act of Congress" authorizing the detentions even under section 4001(a).

ARGUMENT

I. THE UNITED STATES IS AT WAR.

There can be little doubt that the savage attacks on the United States on September 11, 2001, were acts of war. Although launched from within the United States, they were carried out by a foreign terrorist organization whose aim is to mercilessly kill innocent American civilians in order to force the United States out of the Middle East region and to promote its virulent, extremist political philosophy. The attacks killed approximately three thousand Americans and foreign nationals, and targeted political, military, and financial centers of the United States. It is only because of the brave sacrifice of passengers on a fourth jet that crashed

in rural Pennsylvania that al Qaeda did not succeed in attacking either the White House or the Capitol Building in addition to the Pentagon and the World Trade towers. September 11 followed a series of other attacks by al Qaeda launched against Americans abroad, including the 2000 attack on the U.S.S. Cole in Yemen, the 1998 bombing of our embassies in Kenya and Tanzania, the 1996 bombing of a military housing complex in Saudi Arabia, and the 1993 bombing of the World Trade Center.

On September 18, 2001, by votes of 98-0 in the Senate and 420-1 in the House, Congress found that "these grave acts of violence" posed a direct threat to the national security and foreign policy of the United States and that they "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." 115 Stat. 224. It found that it is "both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." Accordingly, the Joint Resolution authorized the President

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[2]

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[2] There is no constitutional requirement that Congress's power to declare war be exercised through a formal declaration. "Of course, a state of war may in fact exist without a formal declaration." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring). *See also Bas v. Tingy*, 4 U.S. 37, 40-41 (1800). In fact, no declaration was necessary, as a state of war was automatically triggered by the September 11 attacks by al

Further proof that Congress recognizes the existence of a state of war is found in the War Powers Resolution. The Resolution provides that the President can exercise his Commander-in-Chief powers "pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." 50 U.S.C. § 1541(c). Conditions two and three have been met: the nation suffered a direct attack on September 11, and the Joint Resolution provides the President with "specific statutory authorization" to use force against those responsible.[3] Both the Joint Resolution and the War Powers Resolution affirm that Congress has recognized the existence of a state of war.

The President has likewise concluded that the September 11 attacks initiated a war. Shortly after September 11, President Bush declared a national emergency. Declaration of National Emergency by Reason of Certain Terrorist Attacks, 66 Fed. Reg. 48,199 (Sep. 14, 2001). He declared "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces," triggering the President's war powers authority pursuant to the War Powers Resolution. 50 U.S.C. § 1541(c)(3). In his September 18 signing statement accompanying the Joint Resolution, President Bush declared: "Our whole Nation is unalterably committed to a direct, forceful, and comprehensive response

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Qaeda an international terrorist organization that declared war on the United States as early as 1996. *See, e.g.*, U.S. Dep't of State, *Fact Sheet: The Charges Against International Terrorist Usama bin Laden* (Dec. 15, 1999), *available at* http://usinfo.state.gov/topical/pol/terror/99129502.htm.

[3] Section 2(b)(1) of the Joint Resolution states: "Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.." 115 Stat. 224.

to these terrorist attacks and the scourge of terrorism directed against the United States and its interests." In a November 2001 order, the President found that the attacks "created a state of armed conflict." 66 Fed. Reg. 57,833 (Nov. 13, 2001).

The President and Congress are charged under the Constitution with all of the federal government's war power. This includes the sole power to decide whether war exists, the measures to be taken to successfully prevail, and the direction of the military forces of the United States to achieve the goals of the war.[4] Furthermore, the Constitution requires that the decision of the political branches charged with the war power binds the federal judiciary. The federal courts have no authority to contradict a determination by the President and Congress that a state of war exists. This Court recognized this proposition as long ago as the Civil War. In reviewing whether the outbreak of the Civil War constituted a war, this Court recognized that a presidential proclamation of an outbreak of hostilities and the imposition of a blockade of the Southern states was sufficient action by the political branches to determine that war existed.[5]

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[4] "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted." *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870).

[5] *See The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (emphasis added):

> Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and *this Court must be governed by the*

Indeed, this Court has never exercised its power of judicial review to decide whether war existed contrary to the decision of the President and Congress. The political question doctrine bars any such judicial decision, because the issue is textually given to the Congress via the Declare War Clause and the President through the Commander-in-Chief power, and because it is one for which judicially-manageable standards do not exist. *Cf. Nixon v. United States*, 506 U.S. 224 (1993). The federal courts do not have the expertise or capability to determine whether the actions undertaken by the government are necessary or appropriate for fighting a war, and they risk interference with the nation's need for a single, unitary national security policy in regard to an international armed conflict. This is particularly the case in the war against al Qaeda, a war unlike any modern war this country has faced. The judicial branch has no constitutional standards to apply to determine whether a war can exist with an enemy which, though lacking the territory and population of a traditional enemy nation-state, has the capability and intention to attack the United States with the power of a nation-state. The separation of powers and principles of nonjusticiability require that this Court accept the decision of the political branches that the nation is at war.

To exercise judicial review over the decision on war would represent an unprecedented intrusion into the prerogatives of the President and Congress and their determined efforts at cooperation in this war. In the Joint Resolution, Congress found that the United States had suffered a direct attack and delegated to the President the full

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decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

extent of powers necessary and appropriate to exercise self-defense and to prevail in the conflict with al Qaeda. And as explained earlier, this Court has never questioned a Congressional determination about a state of war.

Moreover, judicial second-guessing of the political branches is particularly inappropriate in this case. This Court has long rejected the notion that suits brought by private individuals, including habeas petitions, may be used to question the Legislative and Executive's determination that our nation is at war. "Certainly it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region." *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950); *see also The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862).[6] After all:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

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[6] In fact, *The Prize Cases* suggest that we were at war the moment the terrorists attacked us, regardless of what Congress authorized. "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. at 668.

Eisentrager, 339 U.S. at 779. Accordingly, no lower federal court has questioned the joint decision of the President and Congress that this nation is indeed currently at war.[7]

II. AS A MATTER OF EXPRESS LANGUAGE, COMMON SENSE AND JUDICIAL DOCTRINE, "ALL NECESSARY AND APPROPRIATE FORCE" IN THE JOINT RESOLUTION INCLUDES THE POWER OF DETENTION.

"When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also Dames & Moore v. Reagan*, 453 U.S.

[7] *See, e.g., Flynt v. Rumsfeld*, __ F.3d __, 2004 WL 190072 (D.C. Cir. 2004) ("Shortly after the September 11, 2001, terrorist attacks, the United States military began combat operations in Afghanistan in support of the global war on terrorism."); *In re Sealed Case*, 310 F.3d 717, 732-33 (For. Intel. Surv. Rev. 2002) (describing "law enforcement efforts in the war against terror"); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 202 (3d Cir. 2002) (Becker, C.J.) ("The era that dawned on September 11th, and the war against terrorism that has pervaded the sinews of our national life since that day, are reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches."). In addition to all branches of the United States government, foreign entities also acknowledge that the United States is engaged in a bona fide war. For example, "the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS), and the remaining parties to the Security Treaty between the United States, Australia, and New Zealand (ANZUS), have all concluded that the September 11 attacks activated the mutual self-defense clauses of their treaties involving the United States." John C. Yoo and James C. Ho, *The Status of Terrorists*, 44 Va. J. Int'l L. 207, 212-13 (2003) (footnotes omitted).

654, 668, 661-62 (1981). Because President Bush's decisions to detain Hamdi and Padilla are expressly supported by the Joint Resolution, they are "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown,* 343 U.S. at 637.

The Joint Resolution specifically authorizes "the President ... to use all necessary and appropriate force" against those individuals, organizations and nations that he determines participated or helped to cause the September 11 attacks. The greater, and more lethal, power to use military force against the enemy necessarily includes the lesser power to detain them. Any other reading would offend logic, common sense, and judicial precedent.

As a logical matter, the power to use military force includes the power to detain. There is no conceivable reason why the greater power – in this case, one that involves the power to take the life of another – would not include the lesser. While a deprivation of liberty is undoubtedly serious, it cannot reasonably be considered worse than or even equivalent to the deprivation of one's life.[8] Further, detention itself centrally involves the use of force. When the U.S. military initially captured and detained Hamdi and Padilla, it *compelled them by physical means* to stop their efforts on behalf of the Taliban and al Qaeda, and moved them to prison facilities. Hamdi and Padilla remain in naval brigs because they are compelled both by physical means and by

[8] The district court in *Padilla I* made exactly this point in its interpretation of *Quirin*. *See Padilla I*, 233 F. Supp. 2d at 595 ("If, as seems obvious, the Court in fact regarded detention alone as a lesser consequence than the one it was considering – trial by military tribunal[, which could lead to death or imprisonment] – and it approved even that greater consequence, then our case is *a fortiori* from *Quirin* as regards the lawfulness of detention under the law of war.").

legal requirement to remain there. The U.S. government literally uses guards and weapons to keep them in captivity as enemy combatants.

Hamdi and Padilla's proposed construction would lead to an absurd result. *See, e.g., Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). "It would be curious if the resolution authorized the interdiction and shooting of an al Qaeda operative but not the detention of that person." *Padilla* Pet. App. 70a-71a (Wesley, J., dissenting in part and concurring in part). Indeed, Hamdi and Padilla's construction would create a perverse incentive to use *more* force than is "necessary and appropriate" in some situations. If handcuffed by a judicial decision that U.S. forces have no power of detention, U.S. soldiers may be faced with the choice between inflicting violence and letting a potentially deadly terrorist go free. Without the reasonable and time-honored option of detention, troops will be forced to kill or maim enemy combatants because they dare not let them go free.

This Court has agreed with this logic before. In *Moyer v. Peabody*, 212 U.S. 78 (1909), Justice Holmes concluded for the Court that an executive's authority to use force includes the lesser power to detain. During an uprising in Colorado, the governor exercised his Commander in Chief powers under the state constitution to "suppress insurrection, and repel invasion." *Id.* at 82. Pursuant to this power, he detained one citizen for over two months. This Court found that the detention of the citizen was legal under the state constitution's authorization to the governor to use force. Justice Holmes's opinion is instructive on this score. The state constitutional provision, he observed, "means that [the governor] shall make the ordinary use of soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace." *Id.* at 84. "Such arrests are not necessarily for punishment,

but are by way of precaution, to prevent the exercise of hostile power." *Id.* at 84-85. When the executive is authorized "with regard to killing men in the actual clash of arms . . . the same is true of temporary detention to prevent apprehended harm." *Id.* at 85. "As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection . . . we are of opinion that the same is true of a law authorizing by implication what was done in this case." *Id.* This Court has thus recognized that the greater power to use force implies the lesser power to detain.

This conclusion is reinforced by a long tradition of judicial deference to the political branches during times of war. "[T]he Framers 'did not make the judiciary the overseer of our government.'" *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring)). The President in particular is afforded great latitude in the execution of his core Commander-in-Chief powers during wartime. "[U]nless Congress *specifically* has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (emphasis added).[9]

Hamdi and Padilla ask this Court to violate its own standards of deference, demanded by the separation of

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[9] *See also Quirin*, 317 U.S. at 25 (courts cannot interfere with Executive Branch decisions to detain enemy combatants "without the *clear* conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted") (emphasis added); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (when Congress and the President are acting in concert during wartime, "it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs"). This case presents no conflict of opinion between the political branches. And even in cases involving such interbranch disagreement, courts would decide only which of the two political branches controls.

powers, by asking it to find that the Joint Resolution did not authorize their detention, despite its sweeping language to the contrary. They would have this Court ignore clear Congressional intent to authorize the President to exercise all military powers needed to successfully prosecute war. That would invade Congress's prerogative to decide whether and how to delegate authority to the Executive Branch in wartime. Further, Hamdi and Padilla would impose an unwarranted burden on Congress to enumerate all possible powers when delegating authority to the President. Their position, for example, would require that Congress not only authorize the President to use force, but also separately authorize him to arrest the enemy, to detain the enemy, to accept the surrender of the enemy, to interrogate the enemy, to release detainees, and so on. This argument fails to respect the Constitution's vesting of all of the war power in the political branches, and does not give due deference to Congress's role in deciding how to delegate authority to the President. Such judicial intervention in such matters is also unnecessary: if Congress believes that the President has overstepped his authority, it has numerous tools available to it to respond, including statutory amendment or withholding appropriations. It is difficult to imagine a greater judicial intrusion into the separation of powers than one that would dictate to the President and Congress how to conduct a war.

III. THE PRESIDENT'S WARTIME AUTHORITY IS UNAFFECTED BY AN ENEMY COMBATANT'S CITIZENSHIP OR THE LOCATION OF HIS CAPTURE.

The President's authority, both inherent and delegated, to detain enemy combatants in the course of a war has never been affected by the citizenship of the combatant.[10]

[10] *See, e.g., Quirin*, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency."); *In re Territo*, 156 F.2d 142, 144 (9th Cir. 1946) ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America."); *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied* 352 U.S. 1014 (1957) ("[T]he petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war.").

Moreover, a rule that American citizens are constitutionally exempt from the federal government's war powers would offend both history and logic. During the Civil War, almost every Confederate soldier was an American citizen. A constitutional rule forbidding detention of American citizens as enemy combatants would have disastrously undermined the Union's ability to fight the Civil War. The impact on war of such an illogical rule would only be magnified during the current conflict. It would encourage America's enemies to recruit American citizens to carry out attacks such as September 11 in the hopes that they would be immune from the war power of the government.

The President's authority to detain enemy combatants is also unaffected by the location or manner of their capture. As this Court has unanimously held, all individuals, regardless of citizenship, who "associate" themselves with the "military arm of the enemy" and "with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war." *Quirin*, 317 U.S. at 37-38. Nothing further need be demonstrated to justify their detention as enemy combatants. The individuals need not be caught while engaged in the act of war or captured within the theater of war.[11] They need not

[11] *See id.* at 38 ("Nor are petitioners any the less belligerents if . . . they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.").

be found carrying weapons.[12] Nor must their acts be targeted at our military.[13] Accordingly, all "those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants." *Id.* at 35.[14]

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[12] *See id.* at 37 ("It is without significance that petitioners were not alleged to have borne conventional weapons . . . .").

[13] *See id.* ("It is without significance that . . . their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. [The rules of land warfare] plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States.").

[14] *Ex parte Milligan*, 71 U.S. (1 Wall.) 2 (1866), does not suggest otherwise. Milligan was arrested in Indiana and tried before a military tribunal for conspiring against the United States by planning to seize weapons, free Confederate prisoners, and kidnap the governor of Indiana. This Court found that the military could not apply the laws of war to citizens in a state that had never opposed the United States, and in which the civilian courts are open. *See id.* at 121-22. In reaching that conclusion, the *Milligan* court made clear that the laws of war did not apply to Milligan because "he lived in Indiana for the past twenty years, was arrested there, and had not been, during [the Civil War], a resident of any of the states in rebellion." *Id.* at 131. Moreover, this Court specifically concluded that Milligan "was not engaged in legal acts of hostility against the government." *Milligan*, 71 U.S. at 131.

The circumstances of Hamdi and Padilla are entirely different. Unlike Milligan, Hamdi and Padilla were closely "associate[d] with the "military arm of [an] enemy" at war with the United States. *Quirin*, 317 U.S. at 37-38. Hamdi was detained on the battlefield in Afghanistan, having taken up arms in direct conflict with the U.S. Armed Forces. As the district court noted in *Padilla I*, Padilla spent time in Afghanistan and elsewhere with known members of al Qaeda, including a senior Osama bin Laden lieutenant named Abu Zubaydah, just months before the

IV. 18 U.S.C. § 4001(a) DOES NOT APPLY TO THE PRESIDENT'S POWER DURING WARTIME TO DETAIN ENEMY COMBATANTS.

Hamdi and Padilla seek to escape the scope of the government's war power by arguing that 18 U.S.C. § 4001(a) trumps the Joint Resolution. Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." That provision, however, does not undermine or restrict the President's constitutional authority as Commander in Chief to detain enemy combatants. Examined in the context of section 4001 and of the United States Code as a whole, subsection (a) does not reach so broadly. Moreover, the canon of construction that statutes be construed to avoid constitutional defects requires that section 4001(a) be construed not to interfere with the President's constitutional powers as Commander in Chief.

To be sure, section 4001(a) uses broad language. It neither draws a distinction between differing types of detention nor mentions military detention for explicit

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September 11 attacks. *Padilla* Pet. App. 85-86a. Padilla researched possible terrorist plans "at an al Qaeda safehouse in Lahore, Pakistan," and "discussed that and other proposals for terrorist acts within the United States with al Qaeda officials he met in Karachi, Pakistan, on a trip he made at the behest of Abu Zubaydah." *Id.* at 86a. The President's June 9 Order specifically states that "Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States." *Id.* at 57a.

86 years after *Milligan*, the Court in *Quirin* specifically limited *Milligan*, noting that that Court's holding had "particular reference to the facts before it." It is *Quirin*, and not *Milligan*, that applies here.

inclusion or exclusion.[15] It is important, however, to examine the law in its entirety to understand its scope. *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). Nothing in section 4001 indicates that its provisions were meant to reach the President's authority, as Commander in Chief, to detain enemy combatants.

Read in context, section 4001(a) addresses the Attorney General's authority to govern the federal civilian prison system – and *not* the President's constitutional wartime power as Commander in Chief to detain enemy combatants. Congress specifically added subsection (a) to section 4001 in 1971. Act of Sep. 25, 1971, Pub. L. No. 92-128, § 1, 85 Stat. 347. Prior to 1971, section 4001 simply gave the Attorney General the power to "control and manage[]" the federal civilian prison system. Act of June 25, 1948, ch. 645, § 4001, 62 Stat 683, 847. That earlier language is identical to subsection (b) today. Then, as now, the plain terms of the provision specifically carve out "military or naval institutions" from the statute's coverage of "Federal penal and correctional institutions." Accordingly, construing the scope of subsection (a) broadly, to cover all types of detention, is difficult to reconcile with its coupling with subsection (b). The better reading is that subsections (a) and (b) have the same scope, applying exclusively to the federal civilian prison system.

As a structural matter, the placement of section 4001(a) in the United States Code signifies that it was not intended to govern the detention of enemy combatants by the U.S. Armed Forces. Title 18 of the United States Code covers "Crime and Criminal Procedure." Statutes concerning the military and national security, by contrast, are generally found in Title 10 ("Armed Forces") and in Title 50 ("War

[15] Courts have found section 4001(a) to be judicially enforceable through the writ of habeas corpus. *See, e.g., Lono v. Fenton*, 581 F.2d 645 (7th Cir. 1978).

and National Defense"). Moreover, the particular part of Title 18 in which section 4001 is located contains chapters exclusively governing federal criminal confinement. Part III of Title 18, which contains section 4001, is entitled "Prisons and Prisoners" and contains chapters relating to the Bureau of Prisons, good time allowances, parole, and institutions for women, among other topics. Nothing in those provisions can plausibly be construed to apply to the detention of enemy combatants. Congress's decision to place section 4001(a) in this particular provision of the U.S. Code thus provides further support for the conclusion that subsection (a) does not apply to the President's constitutional power to detain enemy combatants.

Congress likewise has effectively construed section 4001(a) not to restrict the President's constitutional power as Commander in Chief to detain enemy combatants. In 1984, thirteen years after the enactment of section 4001(a), Congress added section 956 to Title 10 of the U.S. Code, which specifically governs the U.S. Armed Forces. That statute explicitly authorizes the U.S. Armed Forces to use any funds appropriated to the Department of Defense to pay for the detention of prisoners of war and other enemy combatants. Specifically, 10 U.S.C. § 956 (2000) authorizes the use of Defense Department funds for "expenses incident to the maintenance, pay, and allowances of prisoners of war" as well as of "other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of the Army, Navy, or Air Force pursuant to Presidential proclamation." This provision plainly contemplates that the President has the power to detain prisoners of war and other enemy combatants, presumably as an exercise of his constitutional authority as Commander in Chief, notwithstanding the prior enactment of section 4001(a). The language of 10 U.S.C. § 956 is thus difficult to reconcile with section 4001(a) -- unless subsection

(a) is construed *not* to interfere with the President's constitutional power to detain enemy combatants. When it enacted 10 U.S.C. § 956, Congress must have understood that the President already had the authority to direct the U.S. Armed Forces to detain prisoners of war, and that the enactment of section 4001(a) had done nothing to undermine that authority.

With the lone exception of the *Padilla* case, *see, e.g., Padilla* Pet. App. 1a-75a, no court has ever construed section 4001(a) to apply to the detention of enemy belligerents in an armed conflict, or to restrict the President's constitutional authority to detain enemy combatants.[16] Moreover, the conclusion that section 4001(a) does not, and should not be construed to, interfere with the President's constitutional authority as Commander in Chief is supported by the well-established canon of construction that statutes are not to be construed in a manner that presents constitutional difficulties, so long as a reasonable alternative construction is available.[17]

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[16] To the contrary, prior to *Padilla*, every other judicial decision interpreting section 4001(a) applied that provision to the federal civilian prison system. *See Howe v. Smith*, 452 U.S. 473, 479 (1981); *Lono v. Fenton*, 581 F.2d 645, 648 (7th Cir. 1978); *Seller v. Ciccone*, 530 F.2d 199, 201 (8th Cir. 1976); *Marchesani v. McCune*, 531 F.2d 459, 461 (10th Cir. 1974); *Bono v. Saxbe*, 462 F. Supp. 146, 148 (E.D. Ill. 1978).

[17] *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This canon of construction applies where an act of Congress could be read to encroach upon powers constitutionally committed to a coordinate branch of government. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 800-1 (1992) (citation omitted); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465-67 (1989). And in the area of foreign affairs, and war powers in particular, the avoidance canon has special force. *See, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 232-33 (1986). This Court should not lightly assume Congress has interfered with the

A review of the legislative history of 18 U.S.C. § 4001(a) underscores the conclusion that Congress never intended that provision to restrict the President's constitutional authority as Commander in Chief to detain enemy combatants. While some in Congress questioned the law's scope as potentially infringing on the President's war powers, others assured members that the statute could not extend so far. At best, the legislative history demonstrates that Congress had no fully shared understanding that section 4001 either regulated the President's Commander in Chief authority or did not. The inconclusive nature of the legislative history thus requires this Court to rely upon the scope of the President's war power, the structure of section 4001 and its placement in the U.S. Code, and the canon of avoidance.

First, the 1971 addition of section 4001(a) was accompanied by, and closely identified with, the repeal of the Emergency Detention Act of 1950, ch. 1024, 64 Stat. 1019, 1019-31, *codified at* 50 U.S.C. §§ 811-826, *repealed by* Pub. L. No. 92-128, 85 Stat. 347. That Act authorized the federal government to detain individuals suspected of violating certain *criminal* statutes. Specifically, it empowered the Attorney General "to apprehend and by order detain . . . each person as to whom there is [a] reasonable ground to believe that such person . . . will engage in, or probably will conspire with others to engage in, acts of espionage or . . . sabotage." 64 Stat. 1021. Espionage and sabotage were expressly defined in relation to particular sections of Title 18 of the

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President's constitutionally superior position as Chief Executive and Commander in Chief in the areas of foreign affairs and national security, and the Court's consistent view that "'foreign policy [is] the province and responsibility of the Executive.'" *Egan*, 484 U.S. at 529 (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)). *See also Agee*, 453 U.S. at 291. As this Court has repeatedly emphasized, the President's foreign affairs power necessarily exists independently of Congress. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936).

United States Code. *Id.* In other words, the Act authorized detention of individuals based on suspected criminal conduct. Thus, the repeal of the 1950 Act, and the accompanying enactment of section 4001(a), addresses similar forms of detention and *not* the detention of enemy combatants.

Second, an earlier version of the legislation enacting section 4001(a) suggests that the provision was not intended to reach the detention of enemy combatants. The original version of the House bill ultimately enacted, H.R. 234, did not include the language "except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). Instead, it more broadly prohibited the detention of any U.S. citizen "except in conformity with the procedures and the provisions of title 18." H.R. Rep. No. 92-116 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1437. A Department of Justice witness objected to the language on the ground that the drafters had incorrectly assumed that "all provisions for the detention of convicted persons are contained in title 18." *Id.* The witness went on to list the numerous other federal statutes, outside of title 18, authorizing the confinement of persons convicted of federal crimes.[18] The Committee accepted the witness's objection and recommended an amendment that changed the language to "except pursuant to an Act of Congress." *Id.* Notably, neither the witness nor any member of the Committee ever mentioned expanding the scope of the prohibition beyond detention related to criminal activity. Thus, the change in the legislation occurred in order to recognize other forms of detention of "convicted persons" under the federal criminal laws, and not the preventive detention of enemy combatants that occurs pursuant to the President's Commander in Chief authority.

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[18] *See id.* (citing, among others, provisions dealing with crimes involving narcotics in title 21, Internal Revenue violations in title 26, and crimes involving aircraft hijacking, carrying explosives aboard an aircraft and related crimes in title 49).

Finally, the relevant House floor debate fails to demonstrate a universal, shared understanding of section 4001(a) as an effort to regulate or interfere with the President's Commander in Chief authority to detain enemy combatants. Over a two-day period in September, 1971, the House debated two competing bills: H.R. 234, reported out of the Judiciary Committee, which repealed the Emergency Detention Act and added section 4001(a), and H.R. 820, reported out of the Internal Security Committee, which acted to amend the Emergency Detention Act to prohibit its use "solely on account of race, color, or ancestry." 117 Cong. Rec. at 31754 (1971). The House floor debate reflected the presence of three distinct views of the legislation.

In the first camp, there was wide support for eliminating the possibility of any future use or creation of *civilian* (as opposed to enemy combatant) detention camps. The internment of Japanese-Americans during World War II was frequently invoked by members of Congress to highlight the need for statutory action. Noting that the Emergency Detention Act was not in place during World War II, proponents of H.R. 234 argued that a simple repeal of the Emergency Detention Act would not necessarily eliminate the possibility of future creation or use of civilian detention camps.[19] That concern was the impetus for the addition of the language now found in 18 U.S.C. § 4001(a). Notably, this view does not conflict with our interpretation of section 4001(a), because unlike Hamdi and Padilla today, the Japanese-Americans detained during World War II were held not as enemy combatants, but as civilians.

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[19] *See* 117 Cong. Rec. at 31541 (statement of Rep. Kastenmeier) ("It has been suggested that repeal alone would leave us where we were prior to 1950. The committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an act of Congress, exists. This will assure that no detention camps can be established without at least the acquiescence of the Congress.").

Members of the second camp feared the legislation went too far and violated separation of powers because it infringed upon the President's constitutional powers and duties.[20] These critics suggested that the law's broad language could be read to interfere with the President's power to detain enemy combatants. Importantly, these members did not offer this reading as an authoritative interpretation of the statute's meaning, but rather as an effort to narrow its scope.

Finally, then-Congressman Abner Mikva, responding to both groups, noted that Congress lacked the authority to interfere with the President's constitutional powers, and that H.R. 234 should not be interpreted to do so. He argued:

> If there is any inherent power of the President of the United States, either as the Chief Executive or Commander in Chief, under the Constitution of the United States, to authorize the detention of any citizen of the United States, nothing in [H.R. 234] interferes with that power, because obviously no act of Congress can derogate the constitutional power of a President.

Id. at 31555.[21] Accordingly, there was no agreement in Congress that section 4001(a) covers enemy combatants.

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[20] *See, e.g.*, 117 Cong. Rec. at 31542 (statement of Rep. Ichord) ("[The amendment] would deprive the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises. Hence the amendment also has the consequence of doing patent violence to the constitutional principle of separation of powers. . . . Although many Members of this House are committed to the repeal of the Emergency Detention Act of 1950, they have no purpose, I am sure, to confound the President in his exercise of his constitutional duties to defend this Nation, nor would they wish to render this country helpless in the face of its enemies.").

[21] Moments later, Mikva elaborated on this point:

> The next group of opinion would hold that the Federal Government does have certain emergency powers which can be exercised if necessary for self-preservation. Some in this group would give extensive latitude to the President to exercise such war powers, finding the justification in his [powers] as Commander in Chief of the Armed Forces, as well as in his sworn duty to uphold the Constitution and to preserve the Republic. Once again, it is difficult to see how proponents of this view could consistently oppose H.R. 234 on the grounds that it would undercut the President's ability to act in an emergency. After all, if the President's war powers are inherent, he must have the right to exercise them without regard to congressional action. Arguably, any statute which impeded his ability to preserve and protect the Republic from imminent harm could be suspended from operation. It is a contradiction in terms to talk of Congress limiting or undercutting an inherent power given by the Constitution or some higher authority. . . . The conclusion to be drawn from all of this is that, historical and philosophical questions aside, the repeal of the Emergency Detention Act which is proposed in H.R. 234 would have no measurable effect on the war powers of the President, whatever those powers are deemed to be at present.

Id. at 31557.

Congress has authorized the current detentions in any event. The Joint Resolution states: "[T]he President is authorized to use all necessary and appropriate force against those . . . persons he determines . . . aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such . . . persons." 115 Stat. 224.[22] As explained,

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[22] *See Bowsher v. Snyar*, 478 U.S. 714, 756 (1986) (finding that a joint resolution satisfies "the full Article I requirements"); *Padilla I*, 233 F. Supp. 2d at 598 (collecting cases that describe a joint resolution as an "Act of Congress").

the power to use force plainly includes the power to detain. We agree with Judge Wesley that a contrary interpretation of the Joint Resolution "requires a strained reading of the plain language of the resolution and cabins the theater of the President's powers as Commander in Chief to foreign soil. If that was the intent of Congress it was masked by the strong and direct language of the Joint Resolution." *Padilla* Pet. App. 74a. This Court should respect the judgment of both political branches and effectuate the plain meaning of the Joint Resolution, and hold that the President has the wartime power to detain enemy combatants.[23]

CONCLUSION

The Court should affirm the judgment of the Fourth Circuit below, and reverse the judgment of the Second Circuit below.

Respectfully submitted.

[23] International law, including the Geneva Conventions of 1949, likewise does not forbid the current detentions. *See, e.g.*, John C. Yoo and James C. Ho, *The Status of Terrorists*, 44 Va. J. Int'l L. 207 (2003). The protections of the Geneva Conventions are not self-executing in any event and thus have no legal effect in any federal court. *See Eisentrager*, 339 U.S. at 789 n.14.

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No. 03-1027

IN THE

Supreme Court of the United States

DONALD RUMSFELD,
Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN,
as next friend of Jose Padilla,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES WALTER JONES AND LAMAR SMITH, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub.L.No. 107-40, 115 Stat. 224, to seize and detain a United States citizen in the United States based on a determination by the President that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts, or whether 18 U.S.C. § 4001(a) precludes that exercise of Presidential authority.

2. Whether the district court has jurisdiction over the proper respondent to the amended habeas petition.

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BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES WALTER JONES AND LAMAR SMITH, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted sub nom., Rasul v. Bush*, No. 03-334 (U.S., dec. pending); *Sosa v. Alvarez-Machain*, No. 03-339 (U.S., dec. pending); *Demore v. Kim*, 123 S. Ct. 1708 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001). WLF also filed a brief in this matter when it was before the court of appeals.

The Honorable Walter Jones and the Honorable Lamar Smith are United States Representatives from North Carolina and Texas, respectively. They strongly support the efforts of the Executive Branch to protect the American people by taking aggressive steps to defeat terrorist organizations that have declared war on the United States. Both supported the joint resolution adopted by Congress on September 18, 2001, Pub. L. 107-40, which authorized the President to use "all necessary and appropriate force" to defeat those organizations; they

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

believe that the joint resolution unquestionably authorizes the President to detain enemy combatants (both citizens and aliens) who take up arms against the United States in support of those organizations.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici believe that when American military leaders determine that individuals should be detained as enemy combatants, the courts should be highly deferential to such decisions. *Amici* are concerned that the courts are ill-equipped to second-guess the President when, acting in his capacity as Commander in Chief, he makes decisions implicating sensitive matters of foreign policy, national security, or military affairs.

Amici are filing this brief with the consent of all parties. Letters of consent have been lodged with the clerk.

STATEMENT OF THE CASE

Amici hereby adopt by reference the Statement contained in the brief for Petitioner.

Since September 11, 2001, the United States has been at war with al Qaeda, an international terrorist network that masterminded attacks on American civilians that day. Al Qaeda is an unconventional enemy; it does not control any sovereign territory of its own, and its troops do not wear uniforms in battle or otherwise comply with the rules of war. Nonetheless, there can be little doubt that the war continues

even though al Qaeda has been largely dislodged from its sanctuary in Afghanistan. *See, e.g.* "Al Qaeda Implicated in Madrid Bombings," *Washington Post* (March 15, 2004) at A1 (bombing of Spanish commuter trains on March 11, 2004).

Because al Qaeda does not maintain a standing army, there is no theater of battle in the traditional sense. Rather, the battlefield stretches from Asia through Africa and Europe and into the United States. Indeed, al Qaeda leaders have made clear that their ultimate goal is to destroy major American cities and to bring an end to American civilization. Accordingly, al Qaeda operatives apprehended in the United States can legitimately be said to have been captured on the field of battle.

Respondent Jose Padilla was taken into custody by the Justice Department in Chicago in May 2002 while he was attempting to re-enter the country on a commercial flight. Initially, he was held in New York City under a material witness warrant. On June 9, 2002, President George W. Bush issued an order designating Padilla an "enemy combatant" and directing that he be transferred to the control of the military, in whose custody he remains. According to Petitioner, Padilla is an al Qaeda operative who was trained in Afghanistan in 2001 in the use of explosives and who entered the United States in 2002 for the express purpose of building and detonating a "radiological dispersal device" in a major American city. *See* Declaration of Michael H. Mobbs ("Mobbs Decl."), ¶¶ 5-9, Pet. App. 169a-170a. The President "determined that Padilla posed a continuing, present and grave danger to the national security of the United States, and that detention of Padilla as an enemy combatant was necessary to prevent him from aiding Al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." *Id.* at 171a, ¶ 14. These determinations were based primarily on the

statements of two senior al Qaeda leaders who have been taken into American custody and whose other statements have proven reliable. *Id.* at 168a, ¶ 3.

Padilla has been detained at a military facility in South Carolina since June 9, 2002. He has not been charged with any crime and until recently had been denied contact with visitors, including attorneys. The American military initially determined that successful interrogation of Padilla required that he be denied any such contact. Declaration of Vice Admiral Lowell E. Jacoby at 8-9. On February 11, 2004, the U.S. Department of Defense (DoD) announced that it has decided to permit Padilla access to counsel "as a matter of discretion" because "DoD has determined that such access will not compromise the national security of the United States, and . . . will not interfere with intelligence gathering from Padilla." U.S. DoD, "News Releases: Padilla Allowed Access to Lawyer," *available at* www.defenselink.mil/releases/2004/nr20040211-0341.html.

On June 11, 2002 (two days *after* Padilla was transferred to military custody in South Carolina), Donna Newman (an attorney acting as next friend) filed a habeas corpus petition on Padilla's behalf. The petition, filed in U.S. District Court for the Southern District of New York, asked that Padilla be released from custody and be granted access to counsel. In a December 4, 2002 Opinion and Order, Judge Michael Mukasey decided several important issues with respect to the petition. Pet. App. 76a-166a. He ruled that President Bush had the authority to order the detention as an "enemy combatant" of an American citizen captured in the United States, and that detention may continue for the duration of hostilities regardless whether criminal charges have been filed. *Id.* at 118a-142a. He further ruled that American citizens so detained are entitled to file a federal court challenge to their

designation as enemy combatants, but that that designation should be reviewed under a highly deferential "some evidence" standard. *Id.* at 155a-162a. He further ruled that Padilla should be granted immediate access to counsel, to assist Padilla in marshaling evidence to challenge his designation as an enemy combatant. *Id.* at 142a-155a.

On March 11, 2003, Judge Mukasey denied the government's motion for reconsideration of that part of the Order that granted Padilla access to counsel. *Padilla v. Rumsfeld,* 243 F. Supp. 2d 42 (S.D.N.Y. 2003). Thereafter, both sides sought interlocutory review. On April 9, 2003, the district court certified six issues for interlocutory appeal, including: (1) the extent of the President's authority to detain as an enemy combatant an American citizen captured within the United States; (2) the standard of review to be applied by federal courts to such enemy combatant designations; (3) whether the district court acted properly in granting Padilla access to counsel for the purpose of garnering evidence in support of his petition; and (4) whether the district court properly exercised jurisdiction over the habeas corpus petition. *Padilla v. Rumsfeld,* 256 F. Supp. 2d 218 (S.D.N.Y. 2003). On June 10, 2003, the Second Circuit granted the parties leave to take an interlocutory appeal.

On December 18, 2003, a divided Second Circuit panel issued an opinion remanding the case to the district court with instructions to issue a writ of habeas corpus directing Petitioner Donald Rumsfeld to release Padilla from military custody within 30 days. Pet. App. 1a-75a. The appeals court ruled that Congress expressly prohibited military detention of American citizens when in 1971 it adopted 18 U.S.C. § 4001(a) (the "Non-Detention Act"), and that no legislation adopted in connection with the on-going war on terrorism created an exception to that prohibition. *Id.* at 2a-3a. The

court said that only "clear congressional authorization" is sufficient to overcome the Non-Detention Act's prohibition. *Id.* The court held that detention of American citizens could not "be grounded in the President's inherent constitutional powers" as Commander in Chief of the military, at least where (as here) the detention did not occur on a foreign battlefield. *Id.* at 3a. The court also held that jurisdiction over the petition could be exercised in the U.S. District Court for the Southern District of New York despite Padilla's detention in South Carolina since June 9, 2002 (several days before his habeas petition was filed). *Id.* at 13a-26a. The court also held that its ruling "effectively moots arguments raised by the parties concerning access to counsel, standard of review, and burden of proof." *Id.* at 4a n.1.

Judge Wesley concurred in part and dissented in part. *Id.* at 61a-75a. He argued that the President possesses "inherent authority to thwart acts of belligerency on U.S. soil that would cause harm to U.S. citizens," including the authority to detain American citizens who seek to carry out such acts. *Id.* at 62a. He also would have held that Congress has authorized such detentions. *Id.* at 67a-74a. He would have affirmed Judge Mukasey's Order in its entirety, including Judge Mukasey's rulings that he had jurisdiction over the habeas petition and that Padilla had improperly been denied access to counsel. *Id.* at 61a.

SUMMARY OF ARGUMENT

In its decision holding that the federal courts are not open to provide relief to nonresident aliens whom the Executive Branch has determined to be enemy combatants and who are being detained at overseas locations, this Court stated:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his attention from [ongoing military offensives to] the legal defensive.

Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).

Amici submit that the Second Circuit has met this Court's challenge: it has devised an even more effective method of fettering the American military than the scheme envisioned in *Eisentrager*. It has erected an absolute prohibition against military detention of an American citizen in connection with the on-going campaign to subdue al Qaeda (at least with respect to a citizen found within the United States), without regard to the strength of the military's evidence that the citizen is an al Qaeda foot soldier, that he intends to carry out attacks against the United States if not detained, and that he is capable of carrying out his plan.

The Second Circuit based its ruling on a 1971 federal law that (in the court's view) prohibits the military from detaining American citizens in the absence of "precise and specific language" in subsequent legislation authorizing such detention. Pet. App. 47a. The appeals court misconstrued both the 1971 law and 2001 legislation that gave Congress's blessing to military action against al Qaeda; the latter legislation quite clearly contemplated that the military would detain enemy combatants captured during such military actions, without regard to their citizenship.

The Second Circuit also misconceived the central role of the Executive Branch in military affairs. The Constitution appoints the President -- not Congress -- as Commander in Chief of the military. The detention of an enemy combatant is

not rendered any less a military affair simply because the enemy combatant is an American citizen or because his chosen battlefield is here in the United States. Any effort by Congress to interfere with the President's prerogatives regarding traditional military matters such as the detention of enemy soldiers likely would violate separation-of-powers principles. This Court can avoid deciding the constitutional issue by giving the laws at issue a straight-forward reading; under such a reading, Congress did not prohibit the detention of those, such as Padilla, who are determined by the military to be al Qaeda soldiers.

Padilla and all other American citizens must have a meaningful opportunity to challenge the factual and legal bases of their U.S. government detention, by filing habeas corpus petitions in federal court. As the thoughtful opinions of Judge Mukasey underscore, this case raises difficult issues regarding the right of access to counsel, burdens of proof, and the standard of review to be applied to a federal government "enemy combatant" determination. Those issues are not encompassed within the Questions Presented, however. Because the Second Circuit has not yet addressed those issues, the Court should decline Padilla's invitation to do so in the first instance.

Finally, *amici* agree with Petitioner that the Southern District of New York lacked jurisdiction to hear this case because neither Padilla nor his immediate custodian was located there at any relevant time. Nonetheless, in light of this Court's broad jurisdiction over habeas corpus actions, *amici* suggest that the most appropriate course of action is to address the substantive issue raised by the Petition, rather than to direct dismissal of the underlying habeas corpus petition for lack of jurisdiction. In the event that the Court reverses the Second Circuit and a remand is in order, the case should be remanded

to the District of South Carolina, where both Padilla and his immediate custodian are located.

ARGUMENT

I. THE PRESIDENT HAS THE POWER TO DETAIN ENEMY COMBATANTS, REGARDLESS OF THEIR CITIZENSHIP OR PLACE OF CAPTURE

Throughout our nation's history, the military regularly has detained enemy combatants captured in connection with military operations -- both within American territory and overseas. Indeed, detention of enemy combatants without charges until the cessation of hostilities is the well-accepted norm under the laws of war. *See, e.g., Ex Parte Quirin*, 317 U.S. 1, 28, 31 (1942) ("An important incident to the conduct of war is . . . to seize" enemy combatants; both lawful and unlawful combatants "are subject to capture and detention"); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) ("Those who have written texts upon the subject of prisoners of war agree that all persons who are active in opposing an army in war may be captured.").

The decision below stands in sharp contrast to that history. Without questioning the President's findings that Padilla is an enemy combatant who has committed hostile and war-like acts at the behest of al Qaeda and that his detention is necessary to prevent him from attacking the United States, *see* Pet. App. 171a, the Second Circuit held that the President lacks the authority to order Padilla's detention. *Id.* 26a-55a.

That challenge to the President's authority as Commander in Chief of American military forces is as misguided as it is unprecedented. Congress explicitly authorized the President to use "all necessary and appropriate force" against all nations

or organizations (including, most obviously, al Qaeda) involved in the September 11, 2001 attacks on the United States. In light of the centuries-long military practice of detaining captured enemy combatants for the duration of hostilities, Congress can only be understood to have authorized the President to detain any and all al Qaeda operatives. Moreover, even in the absence of such congressional authorization, the President's inherent constitutional authority as Commander in Chief is sufficient to uphold his decision to detain Padilla.

A. Congress Authorized the President to Detain al Qaeda Military Operatives Without Regard to Citizenship or Place of Capture

The Court need not address the precise scope of the President's authority to detain enemy combatants in the absence of congressional authorization, because Congress has so clearly authorized the President to detain al Qaeda military operatives without regard to citizenship or place of capture.

The Second Circuit based its ruling to the contrary on the 1971 Non-Detention Act, 18 U.S.C. § 4001(a), which provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." As the government has pointed out, there is significant reason to believe that Congress intended § 4001(a) to apply only to civilians, not to enemy combatants who happen to be citizens. But even if the statute is interpreted as applying to *all* citizens, it clearly contemplates situations in which citizens may be detained by the federal government -- *i.e.*, in those instances in which detention is authorized by "an Act of Congress."

Immediately following the September 11, 2001 attacks, Congress enacted an authorization of the type contemplated by § 4001(a). It enacted a resolution expressing its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001). *See* Pet. App. 59a-60a. The President has determined that al Qaeda is such an organization; he has authorized the use of military force against al Qaeda and its operatives in Afghanistan and throughout the world. It is uncontested that the military campaign against al Qaeda continues unabated, and that al Qaeda continues to pose a substantial threat to national security. Given that the "necessary and appropriate force" used by the American military has included killing numerous al Qaeda personnel, it stands to reason that the authorized force also includes the lesser power to capture and detain al Qaeda personnel. Nothing in the AUMF limits the authorization to actions taken overseas[2] or against noncitizens. Accordingly, the AUMF is "an Act of Congress" of precisely the sort contemplated by § 4001(a).[3]

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[2] Indeed, the AUMF explicitly contemplated that the President's "necessary and appropriate force" might include actions taken within the United States. The AUMF stated that the September 11, 2001 attacks rendered it both necessary and appropriate for the federal government "to protect United States citizens both *at home* and abroad." Pet. App. 59a (emphasis added).

[3] The AUMF was denominated by Congress as a "joint resolution." Nonetheless, for all the reasons explained by the district court, a "joint resolution" qualifies as "an Act of Congress" within the meaning of § 4001(a). *See* Pet. App. 139a-141a.

The Second Circuit arrived at its contrary conclusion only by reading far more into § 4001(a) than its language will bear. It held that § 4001(a) permits detention of an American citizen only when Congress adopts legislation that includes "precise and specific language authorizing the detention of American citizens." Pet. App. 47a. But § 4001(a) includes no such requirement. The statute permits detentions "pursuant to an Act of Congress." Nothing in the language of § 4001(a) suggests that Congress intended to prohibit detention of citizens in the absence of statutory language making explicit reference to detention, even when (as here) the natural reading of a subsequently enacted statute indicates that Congress intended to permit the detention of certain enemy combatants without regard to their citizenship.

In support of its view that the powers conferred by the AUMF should be "strictly limited," the Second Circuit cited a statement made by U.S. Representative Lamar Smith, one of the *amici curiae* who have joined this brief, during floor debates on the AUMF. Pet. App. 53a. The citation suggests that the Second Circuit was asserting that Rep. Smith did not believe that the AUMF authorizes detention of U.S.-citizen al Qaeda operatives captured on American soil.[4] That assertion is incorrect. Rep. Smith believed at the time, and still believes, that the AUMF authorizes the President to take all appropriate military action to eliminate the threats to national security

[4] The Second Circuit quotes Rep. Smith as follows: "This resolution should have authorized the President to attack, *apprehend*, and punish terrorists whenever it is in the best interests of America to do so. Instead, the resolution limits the President to using force only against those responsible for the terrorist attacks last Tuesday. This is a significant restraint on the President's ability to root out terrorism wherever it may be found." 147 Cong. H5654 (Sept. 14, 2001) (emphasis added).

posed by al Qaeda; and that the AUMF's authorization is not limited to overseas operations or to actions against noncitizen al Qaeda operatives. As a fair reading of Rep. Smith's statement indicates, his only criticism of the AUMF was that it failed to endorse the same broad military actions against other international terrorist organizations that it endorsed with respect to al Qaeda.[5]

Padilla's effort to compare his detention to detention under the (repealed and largely discredited) Emergency Detention Act of 1950, 50 U.S.C. § 812, 64 Stat. 1019 (1950), is not well taken.[6] That act permitted the President to detain individuals if he had reason to believe that they "probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." *Id.* at § 813. While the repeal of the Emergency Detention Act is a strong indication that Congress has not authorized detention of citizens based on a mere suspicion of *future* criminal activity, Padilla is not being detained on such grounds. Rather, he is being detained because the President has determined that he is an al Qaeda operative and has already conspired to build and detonate "dirty bombs" in major American cities. Mobbs Decl. ¶¶ 5-9, Pet. App. 169a-170a.

Padilla also cites the Patriot Act to support his contention that the AUMF does not authorize his detention:

[5] That intended meaning is borne out by another portion of Rep. Smith's statement that the Second Circuit chose not to cite: "Terrorism is not confined to a single organization or a single group or a specific sect. All terrorists, even those not directly connected to this week's attacks, are a deadly threat and must be neutralized." *Id.* at H5654.

[6] As Padilla noted in his Second Circuit brief, the Emergency Detention Act of 1950 was repealed in 1970 by the Non-Detention Act.

> Shortly after the September 11 attacks, the same Congress that passed AUMF passed the Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). Unlike the AUMF, the Patriot Act expressly gives the Executive authority to detain without charges aliens suspected of terrorist ties for short periods of time before initiation of criminal or removal proceedings. 8 U.S.C. § 1226a(a). The limitations in the Patriot Act prove that Congress has not, in the AUMF, already delegated to the Executive unfettered discretion to detain *anyone, indefinitely*, without charge.

Op. Cert. at 15 n.9.

Padilla's reliance on the Patriot Act is not well taken. The Patriot Act permits *the Justice Department* to detain certain aliens without charges. In contrast, the AUMF addresses actions by the military. The Patriot Act permits detention of several broad categories of aliens, including aliens with ties to any terrorist group. 8 U.S.C. § 1226a(a)(3). In contrast, the AUMF focuses solely on al Qaeda operatives (and any other group involved in the September 11 attacks). Rules adopted by Congress regarding Justice Department detention of one group of individuals has very little bearing on Congress's intent with respect to military detention of another, far smaller group of individuals.

Padilla also argues that if the AUMF were interpreted as permitting detention of enemy combatants affiliated with al Qaeda, even when the combatants are U.S. citizens captured in the U.S., § 4001(a) would no longer serve its intended purpose of imposing strict limitations on detention of citizens:

> The Non-Detention Act would not have achieved its purpose of preventing a recurrence of the Japanese

> internment camps if it could be satisfied by a mere declaration of war or use of military force, for there had been such a congressional declaration of war at the time of the Japanese internment camps themselves.

Op. Cert. at 13 n.7.

There is no similarity between the President's decision to detain two American citizens without criminal charges as enemy combatants and the World War II detention of thousands of American citizens of Japanese ancestry. The internment of those citizens has been justly condemned because there was no showing that any of the detainees was disloyal or posed a threat to national security; rather, they were detained based solely on racial consideration. *Ex Parte Endo*, 323 U.S. 283, 302 (1944) ("A citizen who is concededly loyal presents no problem of espionage or sabotage. . . . When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized."). Conversely, once the President determined that Padilla is an al Qaeda operative intent on blowing up a major American city, he would have been derelict in his duties as Commander in Chief were he not to detain Padilla for the duration of hostilities.

The Second Circuit's conclusion that the AUMF did not authorize detention of U.S. citizens captured in the U.S. and determined to be al Qaeda operatives appears to have been colored by its belief that there is something unusual about this nation detaining U.S. citizens as enemy combatants. That belief is support by neither our history nor case law. *Quirin* could not be clearer that Padilla's American citizenship does not affect the President's authority to hold him as an enemy combatant. *Quirin* involved habeas corpus petitions filed by eight men detained as saboteurs fighting for Nazi Germany

during World War II. The Court assumed that at least one of the eight was a U.S. citizen but held that citizenship was irrelevant to its decision:

> Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war.

Quirin, 317 U.S. at 37-38. *See also Territo*, 156 F.2d at 145 ("We have reviewed the authorities with care and have found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle.").

It is true that the American enemy combatant at issue in *Quirin*, Herbert Haupt, was also being charged before a military tribunal as an *unlawful* combatant (because he was alleged to have sneaked into the United States to destroy war industries). But the Court made quite clear that Haupt was subject to detention as an enemy combatant without regard to the claim that he had violated the laws of war. *See, e.g., Quirin*, 317 U.S. at 31.

The American Civil War well illustrates the proposition that American citizens can be detained as enemy combatants without hearing. During the course of that war, thousands of American citizens were detained without hearing as prisoners of war after being captured while fighting for the Confederate army, yet *amici* are aware of no case law challenging the federal government's authority to engage in such detentions. Indeed, in support of its contention that unlawful combatants can be tried and ordered executed by military tribunals without interference from civilian courts, *Quirin* cited numerous cases

involving Americans detained, tried, and punished by military tribunals for their unlawful conduct during the Civil War on behalf of the Confederate army. *Id.* at 31-33 & n.10.[7]

Nor does history suggest that the military should be barred from applying the laws of war to Padilla simply because he was detained in Chicago rather than overseas. Padilla may not have been detained on a foreign battlefield, but neither was Herbert Haupt,[8] yet that fact did not prevent the Court in *Quirin* from holding Haupt subject to the laws of war. The Court explained that the key prerequisite to application of the laws of war was whether an individual was "a part of or associated with the armed forces of the enemy," *id.* at 45, not the location of capture. Similarly, in *The Prize Cases*, the Court held that nonmilitary cargo belonging to American citizens living in Confederate states was properly seized under the laws of war as "enemies' property" regardless that the property was seized on the High Seas and not in any military zone. *The Prize Cases*, 67 U.S. (2 Black) 635, 674 (1862).

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[7] *Quirin* also makes clear that the Second Circuit's reliance on *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), is not well placed. *Milligan* held that a civilian may not be tried by a military tribunal "where the courts are open and their process unobstructed." *Id.* at 121. *Quirin* pointed out that the Court in *Milligan* had relied heavily on the fact that Milligan was a resident of Indiana (a State not in rebellion during the Civil War) and, although alleged to have engaged in insurrection, had no direct connection to the Confederate army. *Quirin* construed *Milligan* not to limit the power of the federal government to apply the law of war to American citizens, but rather to mean only that the law of war is inapplicable to those "not being a part of or associated with the armed forces of the enemy." *Quirin*, 317 U.S. at 45.

[8] He and the seven other Nazi saboteurs were arrested in Chicago and New York City after sneaking into the United States by sea at Ponte Vedra Beach, Florida and Long Island, New York.

In adopting the AUMF, Congress explicitly recognized that al Qaeda posed a threat to American citizens "both at home and abroad." Pet. App. 59a. In light of that recognition, there is no reason to conclude that Congress nonetheless intended to authorize military action against al Qaeda in overseas locations only. In sum, there is every reason attribute to the language of the AUMF ("authorized to use all necessary and appropriate force") its plain meaning. That language indicates that Congress authorized the President to conduct this war as past wars have been conducted, including authorization to detain enemy combatants without regard to citizenship or location of capture.

B. The AUMF Should Be Interpreted to Authorize Padilla's Detention in Order to Avoid Any Conflict with the President's Inherent Constitutional Powers

The Second Circuit's interpretation of the AUMF is particularly problematic because it denies to the President the pre-eminent role assigned to him by the Constitution in military and foreign policy matters. If the AUMF really had been intended to deny the President authority to detain individuals whom the President has determined to be enemy combatants, separation-of-powers principles would call the constitutionality of the AUMF into serious question. The Court can avoid those concerns by interpreting the AUMF as authorizing Padilla's detention -- an interpretation that (as demonstrated above) is well supported by the AUMF's language.

Indeed, the Second Circuit readily conceded that "great deference is afforded the President's exercise of his authority as Commander-in-Chief." Pet. App. 30a. The President's pre-eminent role in military and foreign policy matters was recognized by the Founding Generation and has continued to

be recognized by this Court. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'") (quoting U.S. Representative John Marshall (10 *Annuls of Cong.* 613 (1800))). *See also Zadvydas v. Davis,* 533 U.S. 678, 696 (2001) ("heightened deference to the judgments of the political branches with respect to foreign policy" is particularly warranted with respect to terrorism-related issues); *Rostker v. Goldberg,* 453 U.S. 57, 66 (1981); *Quirin*, 317 U.S. at 25; *The Three Friends*, 166 U.S. 1 (1897); *The Prize Cases*, 67 U.S. (2 Black) at 670. As Alexander Hamilton reasoned in the Federalist Papers:

> [T]he direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms [a vital] and essential . . . definition of the executive authority.

The Federalist No. 74 at 447 (Clinton Rossiter, ed., 1961).

In his first *Pacificus* essay, his 1793 defense of President Washington's proclamation of neutrality, Hamilton outlined his broad vision of the President's broad authority over military and foreign policy matters. He observed:

> It deserves to be remarked, that as the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly -- and ought to be extended no further than is essential to their execution.

15 *The Papers of Alexander Hamilton* 42 (Harold C. Syrett, ed., 1969). *See generally*, H. Jefferson Powell, "The Founders and the President's Authority Over Foreign Affairs," 40 WM. & MARY L. REV. 1471 (1999).

The Second Circuit nonetheless insisted that the President's Commander-in-Chief powers do not authorize him to detain U.S.-citizen enemy combatants captured in the United States, because such detentions constitute actions "exercised in the domestic sphere." Pet. App. 32. The court held that Executive actions taken in that sphere are subject to control by Congress: "'Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.'" *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring)). Relying on Justice Jackson's concurring opinion in *Youngstown*, the appeals court determined that any decision to abridge the rights of citizens during wartime must come from Congress, not the President:

> The Constitution envisions grave national emergencies and contemplates significant domestic abridgements of individual liberty during such times. . . . Here, the Executive lays claim to the inherent emergency powers necessary to effect such abridgements, but we agree with Padilla that the Constitution lodges these powers with Congress, not the President.

Id. at 35a.

The appeals court's reliance on *Youngstown* is misplaced. The appeals court misperceived the distinction *Youngstown* attempted to draw between the external and domestic spheres. That case was a challenge to President Truman's April 1952 executive order, temporarily taking possession of steel plants

to avoid a work stoppage arising from a labor dispute between steel companies and organized labor. In striking down the executive order, the Court held that the President's military powers could not justify seizing steel mills (based on a claim that steel production was critical to the Korean War effort):

> The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military commanders.

Youngstown, 343 U.S. at 587.

The quoted passage makes clear that the President's military powers were unavailing *not* because he was attempting to invoke them within the borders of the United States. Rather, those powers were unavailing because labor disputes at privately owned domestic steel mills could not reasonably be deemed a part of the "theater of war." In contrast, President Bush's decision to detain Padilla after determining that he is an enemy combatant is precisely the type of decision routinely made by military commanders in the exercise of their military powers. *Youngstown* makes clear that the President is not prohibited from exercising those powers in this case simply because the "theater of war," for the first time since the Civil War, now includes U.S. territory.

Indeed, it makes little sense to suggest that the President's constitutional authority over military affairs is less extensive in a war fought to repel foreign invasion than in an oversees war.

The Second Circuit majority had no effective rejoinder to Judge Wesley's criticism that the majority's position -- that the President lacks inherent authority to detain enemy combatants under the circumstances of this case -- leaves a major chink in the nation's armor:

> The majority's view that "the Constitution lodges [inherent national emergency powers] with Congress not the President," . . . produces a startling conclusion. The President would be without authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat *or* authorized the detention.

Pet. App. 66a.

The majority's only response was that "the President's authority to detain such a person is not an issue raised by this case" because Padilla was already been detained under a material witness warrant before he was designated as an enemy combatant. *Id.* at 42a n.27. But that statement does not adequately respond to Judge Wesley. The Executive Branch may not detain an enemy combatant indefinitely under a material witness warrant. If the President lacks inherent authority to detain enemy combatants, then sooner or later he will be required to release the combatants -- regardless that the war continues and that the combatants would be in a position to resume their belligerence toward the United States.

Nor is it sufficient to suggest that the President initiate criminal proceedings and to detain the enemy combatant pursuant to those proceedings. Proving that Padilla is an al Qaeda operative presumably would require the military to provide the in-court testimony of captured al Qaeda leaders who have implicate Padilla. It is unlikely that the government ever would be able to elicit such testimony from al Qaeda leaders who themselves are being held without trial as enemy combatants. Moreover, any attempt to elicit such testimony would be sufficiently disruptive of the war effort that one could reasonably expect that military leaders would release Padilla before resorting to such an attempt.

In sum, any decision that would interpret the AUMF as denying the President authority to detain U.S.-citizen enemy combatants captured domestically would raise serious concerns regarding the AUMF's constitutionality. In order to avoid those concerns, the Court should interpret the AUMF as authorizing Padilla's detention.

II. THE SOUTHERN DISTRICT OF NEW YORK LACKED JURISDICTION OVER PADILLA'S HABEAS PETITION

Congress has authorized writs of habeas corpus to be granted "by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a). This Court has held that the phrase "within their respective jurisdictions" (contained in the predecessor to § 2241(a)) to limit proceedings to the federal district in which the petitioner is detained. *Carbo v. United States,* 364 U.S. 611, 617 (1961); *Wales v. Whitney*, 114 U.S. 564 (1885).

Padilla has been detained in the District of South Carolina since June 9, 2002. When he filed his habeas petition several days thereafter, he filed in the Southern District of New York. A straightforward application of *Carbo* and *Wales* would seem to have required the Second Circuit either to dismiss the petition or to order its transfer to South Carolina pursuant to 28 U.S.C. § 2241(b). The Second Circuit nonetheless rejected the government's efforts to dismiss the petition on jurisdictional grounds, ruling that the Southern District of New York could properly exercise jurisdiction over the petition and that Secretary of Defense Donald Rumsfeld (rather than Padilla's immediate custodian in South Carolina, Commander Melanie A. Marr) was a proper respondent. Pet. App. 13a-26a.

The Second Circuit's novel approach to habeas jurisdiction has little to recommend it and ought to be reversed. Other appeals courts have regularly applied § 2241(a) to require, in all but exceptional cases, that habeas petitions be filed in the district in which the petitioner is being detained -- in this case, South Carolina. Enforcing § 2241(a) in that manner furthers predictability in the law, discourages forum shopping, and distributes habeas petitions relatively equally among the federal district courts. *al-Marri v. Rumsfeld*, ___ F.3d ___, 2004 U.S. App. LEXIS 4445, at *9 (7th Cir., March 8, 2004) (detention of alien designated as enemy combatant) (Easterbrook, J.).

The Second Circuit reasoned that jurisdiction in New York was appropriate because: (1) Secretary Rumsfeld played "an extraordinary and pervasive role" in Padilla's detention as an enemy combatant, Pet. App. 20a; and (2) Rumsfeld was amenable to service of process under New York's long-arm statute. *Id.* at 25a. But the Second Circuit's approach essentially permits detainees in Padilla's position to file their

petition in *any* federal district court across the country. Such a rule is a recipe for forum shopping. In the absence of evidence that Padilla could not get a fair hearing in the District of South Carolina, he should have been required to file there.

The government argues that Rumsfeld is not a proper respondent in this habeas action, and that the only proper respondent is Commander Marr, Padilla's immediate custodian. *Amici* do not believe that the precise identity of the respondent makes a material difference in this case; the far more important issue from *amici*'s perspective is where the petition should be filed. Under § 2241(a), the clear answer in this case is the District of South Carolina.

Amici recognize that determining where the petitioner is being detained can sometimes raise difficult legal issues. For example, in *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973), the Court was faced with a habeas petition filed by a prisoner being held by Alabama but against whom Kentucky had filed a detainer, based on a pending Kentucky indictment. The prisoner sought dismissal of the Kentucky indictment on speedy trial grounds. This Court held that the prisoner could be deemed in the custody of both states and thus that he had acted properly in seeking habeas relief from the Kentucky indictment in the Western District of Kentucky. *Braden*, 410 U.S. at 500. But the Court never suggested that a habeas petitioner is free to file in any and all districts in which he is able to obtain long-arm jurisdiction over an appropriate respondent. Rather, *Braden* indicated that the general rule (that petitions should only be filed in the district in which the petitioner is being held) could be relaxed in those instances in which the general rule "would serve no useful purpose" and would dictate the choice of "an inconvenient forum." *Id.* at 499-500. In the absence of evidence that Padilla would have

been prejudiced by being forced to litigate in South Carolina, the Second Circuit erred in failing to transfer the case.

The greatest virtue of following the general rule in most cases (requiring the petitioner to file in the district in which he is physically located) is its predictability and ease of application. In contrast, the Second Circuit's approach, which looks to the location of the individual ultimately responsible for the detention decision, suffers from an utter lack of predictability; the identity of that individual inevitably will be subject to dispute. Moreover, allowing petitioners to file in the jurisdiction of their choice not only encourages forum shopping but also encourages courts (inappropriately, in *amici*'s view) to certify nationwide class actions that challenge federal detention policies. *See, e.g., Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003).

Nonetheless, although (under the general rule) the Southern District of New York lacked jurisdiction to hear this petition, *amici* do not believe that the Court should dismiss the petition on jurisdictional grounds. *Amici* believe that the substantive issues raised by the petition are suffiently important that the Court should seek to rule on those issues if at all posible. Because § 2241(a) grants original jurisdiction to this Court, the Court would not be remiss if it invoked that grant to retain jurisdiction over the case.

For the reasons previously stated, if a remand is required, the Court should remand the case to the District of South Carolina, the district in which the petition should have been filed initially.

CONCLUSION

Amici curiae respectfully request that the decision of the court of appeals be reversed. They further request that the case be remanded to the District of South Carolina for consideration of issues not yet addressed by the Second Circuit, including access to counsel, standard of review, and burden of proof.

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No. 03-1027

IN THE SUPREME COURT OF THE UNITED STATES

DONALD RUMSFELD, SECRETARY OF DEFENSE, *Petitioner*
v.
JOSE PADILLA; DONNA R. NEWMAN, AS NEXT FRIEND OF JOSE PADILLA, *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTEREST OF *AMICI CURIAE*

The Circuit Court's opinion in this case is generally appropriate, with one major issue insufficiently developed (as explained in Part II.A. herein) The District Court's opinions in this case (and the district court's and Circuit panel's in *Hamdi v. Rumsfeld*) contained certain errors, misstatements and improper standards that, if considered, are of grave and pressing concern with respect to the right of all persons under international law to independent, fair, effective, and meaningful judicial review of the propriety of their detention and, similarly, with respect to numerous and predominant trends in U.S. judicial decisions (see especially Part III.C herein). Human rights and other international laws are also relevant to the content and contours of the Fifth Amendment to the U.S. Constitution and to congressional and Executive powers relevant to this petition. *Padilla* and *Hamdi* are now both partly before this Court and any errors and improper standards, if accepted, could have serious and unwanted consequences. *Amici curiae*, the international law professors named below, include the *Amici* in *Padilla* before the Second Circuit or other professors who have lectured and/or published widely on these and related matters.[1] This *amicus* memorandum sets forth their considered views. *Amici* sign this memorandum on their own behalf and not as representatives of their respective schools. The affiliations of *amici* are listed in the appendix.

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[1]Letters of consent to the filing of this brief accompany this brief. No counsel for a party authored this brief in whole or in part and no person, other than Amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Circuit Court's opinion in this case is generally correct, although needing further analysis concerning relevant congressional powers, as considered in Part II.A. herein. The District Court in this case, however, had made certain errors and misstatements concerning appropriate legal standards of review of the propriety of detention (see Part III.C) that, if accepted, could have serious unwanted consequences. The District Court had been correct, however, in affirming that there must be judicial review of the propriety of the detention of Jose Padilla by the Executive branch and access to a lawyer for such purpose. Human rights and other international laws, which bind the United States and are part of the law of the United States in various ways, prohibit arbitrary detention and require independent, fair, and effective judicial review. The status of Mr. Padilla (*e.g.*, as detainee, enemy combatant, or unlawful combatant) will not obviate the reach of relevant human rights and other international legal rights, nor would it limit the reach of the Fifth Amendment to a U.S. citizen. The U.S. judiciary has the power and responsibility under international law, Article III of the U.S. Constitution, and numerous U.S. judicial decisions applying international law, the Bill of Rights, and other legal norms, to determine the legal status and rights of persons detained by the Executive. The meaning of the Fifth Amendment to the U.S. Constitution is also informed by customary and treaty-based human rights to due process, including access to courts and to judicial review of the propriety of detention.

ARGUMENT

I. There Must Be Judicial Review of the Propriety of Detention

Under international law and numerous U.S. judicial decisions applying international law, the Bill of Rights, and other legal norms, there are legal limits to the power to detain persons without trial. Contrary to claims by the Administration, judicial review of the propriety of detention must be made available and no legal standard of review permits complete deference to Executive determinations with respect to the legal status and rights of persons detained without trial. See Parts II & III below. It bears emphasis that nothing in the U.S. Constitution or in relevant international law authorizes suspension indefinitely of constitutional rights applicable to a U.S. citizen on the mere allegation or determination of status by members of the Executive branch.

II. Human Rights Law Prohibits Arbitrary Detention and Requires Judicial Review

A. International Human Rights Law Prohibits Arbitrary Detention

Under international law, which is part of the law of the United States in several ways (see Part III.A & B), tests concerning the propriety of detention include relevant human rights standards that are both treaty-based and part of customary international law; and they are applicable in times of both peace and war. Human rights standards

recognized in nearly all major human rights instruments include the fundamental prohibition of "arbitrary" arrest or detention of individuals. *See, e.g.*, *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001); *Ma v. Reno*, 208 F.3d 815, 830 (9th Cir. 2000); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1992); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985); *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322, 1328-29, 1344, 1349-50, 1352, 1357-58, 1360 (N.D. Ga. 2002); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995); *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 798-800 (D. Kan. 1980); *infra* note 3; Report of the Working Group on Arbitrary Detention, Civil and Political Rights, Including the Question of Torture and Detention, para. 64, p.20, Comm'n on Hum. Rts., 59th sess., item 11(a) of provisional agenda, E/CN.4/2003/8 (Dec. 16, 2002), available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/c58095e9f8267e6cc1256cc60034de72?Opendocument; Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 505-07 (2003) [hereinafter Paust, *Judicial Power*].

As an example, Article 9(1) of the International Covenant on Civil and Political Rights, Dec. 9, 1966, 999 U.N.T.S. 171[hereinafter ICCPR], a treaty ratified by the U.S., requires: "Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Among other relevant and binding human rights instruments is the American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser.L./V./I.4, rev. (1965), which is now a legally

authoritative indicia of human rights protected through Article 3(k) of the O.A.S. Charter, a treaty of the United States, done April 30, 1948, 119 U.N.T.S. 3, 2 U.S.T. 2394, T.I.A.S. No. 2631, amended by the Protocol of Buenos Aires, done 27 Feb. 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 [*see also id.* arts. 44, 111]. *See, e.g.*, Advisory Opinion OC-10/89, Inter-Am. Court H.R., (ser. A) No. 10, para. 45 (14 July 1989); Inter-American Comm. on Human Rights, Report on the Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities, Chapter VII (1996), O.A.S. Doc. OEA/Ser.L/V/II.96, doc. 10, rev. 1 (April 24, 1997) ("The American Declaration...continues to serve as a source of international obligation for all member states...."); *see also* American Convention on Human Rights, preamble and art. 29(d), Nov 12, 1969,1144 U.N.T.S. 123, O.A.S. T.S. No. 36. Article XXV of the Declaration assures: "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law."

Whether Mr. Padilla is a peacetime detainee, a wartime "enemy combatant" detained in the U.S., or a so-called unlawful combatant detained in the U.S., is ultimately unimportant, because every person has a fundamental human right to freedom from arbitrary detention, every person has a fundamental and peremptory human right to judicial review of the propriety of detention (see next section), and customary human rights to due process are incorporated through common Article 3 of the 1949 Geneva Conventions and apply to any person who is detained during an armed conflict regardless of personal status. *See, e.g.*, Paust, *Judicial Power*, *supra*, at 505-14 & ns.27, 29 (demonstrating that common Article 3 applies to all detainees, also provides minimum guarantees in an international armed conflict, and

incorporates customary human rights to due process as among "all the judicial guarantees which are recognized as indispensable by civilized peoples"). Similarly, the President has no power to suspend application of the Constitution, especially the Fifth Amendment, to a U.S. detainee regardless of the status of such a person and regardless of the President's provisional characterization. See Part III.B.

The Second Circuit panel in *Padilla* ruled that 18 U.S.C. § 4001(a) (2000) (the 1971 "Non-Detention" Act) precluded Executive detention of U.S. citizens because the Act requires that U.S. citizens shall not be "detained by the United States except pursuant to an Act of Congress" and that no such legislation exists. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), quoting § 4001(a). We agree, although the analysis was incomplete, given the authority under treaty law of the United States to detain certain persons under certain circumstances. First, the 1971 congressional limitation of authority to detain should be interpreted consistently with 1949 treaty-based authority to detain outlined in Article 5 of the Geneva Civilian Convention, 75 U.N.T.S. 287. When a clash between the two is unavoidable, there must be a clear, unequivocal intent of Congress to override prior treaty law for the legislation to prevail under the last-in-time rule (which is not evident from the face of the 1971 legislation or legislative history addressed by the Second Circuit panel). *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 352 (1984); *Cook v. United States*, 288 U.S. 102, 120 (1933); Jordan J. Paust, *International Law as Law of the United States* (2d ed. 2003) [hereinafter Paust, *International Law*], at 99, 101, 120, 125 n.3, and other cases cited. Even when such an intent can be demonstrated, there are Supreme Court-based exceptions to

the last-in-time rule that assure the primacy of treaty law and one such exception requires that the law of war (at least duties and rights thereunder) prevail. *See, e.g.*, Paust, *International Law*, *supra*, at 99-107, 120, and cases cited. More generally, presidential power can be enhanced by international law since the President must faithfully execute law, including international law, and the duty creates a competence to do so. *See, e.g.*, *id.* at 9, 16, 44-47, 79, 82, 88, 180, 185, 457, 468-69, 480-81. Following this approach, it might be argued that the President's authority to detain under Geneva law prevails over the 1971 Act.

Nonetheless, following the reasoning of cases such as *Brown v. United States*, 12 U.S. (8 Cranch) 110, 129 (1814), the competence of the United States to detain certain persons under Articles 5, 42, and 78 of the Geneva Civilian Convention is only exercisable by Congress. In *Brown*, the majority recognized that the laws of war created a competence for the United States to seize enemy property located within the U.S. but held that such a competence must be exercised by Congress. In dissent, Justice Story suggested that the President could execute that competence since all were in agreement that the President was bound to execute the law of war during a war declared by Congress and Congress had set no legislative limits on the President's power to execute such laws or to carry on the war. *Id.* at 145, 149, 153. Even if one follows Story's approach, however, Congress has clearly set a limit on the power to detain U.S. persons and the congressional limit would prevail. This Court has recognized that Congress does have power to place certain limits on the exercise of presidential powers during war and occupation. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (Rehnquist, C.J.)

("restrictions on" executive use of "armed force" can be imposed by "treaty, or legislation"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 602, 609-10 (1952) (Frankfurter, J., concurring); *id.* at 635-36 n.2, 654-55 (Jackson, J., concurring); *id.* at 659-60 (Burton, J., concurring); *id.* at 662 (Clark, J., concurring); *Santiago v. Nogueras*, 214 U.S. 260, 266 (1909) (limits during occupation); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Congress has power to "conduct a war"); *The Thomas Gibbons*, 12 U.S. (8 Cranch) 421, 427-28 (1814) (re: seizure of ships abroad); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814) (re: seizure of property here); *The Flying Fish*, 6 U.S. (2 Cranch) 170, 177-78 (1804) (re: seizure of ships abroad); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (same); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40-42 (1800) (same); *United States v. Smith*, 27 F. Cas. 1192, 1228-31 (C.C.D.N.Y. 1806) (Paterson, J., on circuit) (use of force abroad); 9 Op. Att'y Gen. 516, 518-19 (1860) (Congress can limit use of "land and naval forces" that are otherwise "under his orders as their commander-in-chief"); see also U.S. Const., art. I, §8, cls. 11 (Congress has power to "make Rules concerning Captures on Land and Water"), 14, 18. Recognition that the Geneva Conventions prevail over the 1971 legislation would not answer the question whether it is Congress or the Executive that has the power to exercise a treaty-based competence on behalf of the United States to detain certain persons even though the Executive is bound to comply with duties and rights based in Geneva law (and, similarly, Congress cannot abrogate duties or rights or authorize their infraction, *see, e.g.*, Paust, *International Law*, *supra*, at 106-07, 109), nor would it answer the question whether congressional power exists to set limits and, thus,

has primacy, in case the power to detain is generally shared. The *Prize Cases*, 67 U.S. (2 Black) 635 (1862), are not inconsistent because, in earlier legislation, Congress had specifically authorized the use of force in response to invasions or insurrections and had placed no other limits in the legislation. Ultimately, we agree that Congress has appropriately set a limit.

B. International Human Rights Law Requires Independent, Fair, and Effective Judicial Review

When a person is detained by a state, human rights law requires the availability of judicial review of the propriety of detention. *See, e.g,* Paust, *Judicial Power*, *supra,* at 507-10, and references cited. For example, as mandated in Article 9(4) of the International Covenant on Civil and Political Rights, "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[2] Access to courts for judicial

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[2]Under a U.S. Senate declaration during ratification, if legally operative, the ICCPR would be partly (not fully) non-self-executing. Several *amici* consider the Senate declaration to be either void *ab initio* as a matter of law (since it is inconsistent with the object and purpose of the Covenant – *see, e.g.*, Restatement of the Foreign Relations Law of the United States §313(1)(c) & cmt. c (3ed. 1987); Vienna Convention on the Law of Treaties, May 22, 1969, art. 19(c), 1155 U.N.T.S. 131; Reservations to the Convention on Genocide, [1951] I.C.J. 15, 21) or inoperative because it would not be compatible with the Supremacy Clause, U.S. Const. art. VI, cl.2). In any event, the declaration expressly did not inhibit the reach of Article 50 (which mandates in self-executing terms that all "[t]he

determination of rights, minimum customary due process guarantees, and the right to an effective remedy are also guaranteed more generally under Article 14(1) of the ICCPR, as supplemented by General Comments of the Human Rights Committee created by the Covenant, and Articles XVIII and

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provisions shall extend to all parts of federated States without any limitations or exceptions.") and the Executive intended only that the ICCPR "not create a private cause of action directly under the treaty." *U.S. Sen. Exec. Rep. 102-23*, 31 I.L.M. 645, 648 (102d Cong, 2d Sess, 1992). Also, the ICCPR can be used for other purposes (*e.g.*, defensively or indirectly through constitutional amendments or statutes), and the habeas statute executes for habeas purposes any other relevant, partly non-self-executing provisions. *See, e.g.*, *United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000) (despite declaration, ICCPR is supreme law of the land); *United States v. Duarte-Acero*, 132 F. Supp.2d 1036, 1040 n.8 (S.D. Fla. 2001) (declaration does not apply when raising "ICCPR claims defensively"); *United States v. Bakeas*, 987 F. Supp. 44 (D. Mass. 1997); Paust, Fitzpatrick, Van Dyke, *International Law and Litigation in the U.S.* 75-76, 193-94 (West Group 2000). In this case, Mr. Padilla uses the ICCPR defensively and as executed for habeas purposes by the habeas statute.

Alternatively, the right is also customary international law and, as such, is directly operative as law of the United States concerning individual rights, judicial power and responsibility, and Executive discretion. *See, e.g.*, *id.* at 110-33, 169-70, 244-60; Paust, *International Law, supra*, at 5-9, 143-46, and numerous cases cited. An express purpose of the habeas statute is to allow habeas review for any person "in custody in violation of...the laws or treaties of the United States." 28 U.S.C. § 2241.

XXV of the American Declaration.[3] *See, e.g.*, Paust, *Judicial Power*, *supra*, at 507-10.

The human rights standard concerning judicial review should involve contextual inquiry into whether detention is reasonably needed under the circumstances and, thus, is not arbitrary. However, under the Geneva Civilian Convention, detention of alien persons in the U.S. who pose threats to security during war must be "absolutely necessary." *Id.* art. 42; Paust, *Judicial Power*, *supra* at 512-14 & n.29 (*see also id.* at 518-25, concerning judicial review, and *id.* at 514-18 & ns.39-46, concerning private rights under and use of the Geneva Conventions for habeas and other purposes). Mr. Padilla, as a U.S. citizen, does not benefit from Article 42, but he does have all of the minimum customary human rights to due process (including judicial review of detention) through common Article 3 of the Geneva Conventions. *See, e.g.*, Paust, *Judicial Power*, *supra* at 510-14 & ns.27, 29.

> ...the Human Rights Committee [under the ICCPR] has recognized that freedom from arbitrary detention or arrest is a peremptory norm *jus cogens* (and is,

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[3]The Human Rights Committee is an authoritative body. "General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR" and are "authoritative." *Maria v. McElroy*, 68 F. Supp.2d 206, 232 (E.D.N.Y. 1999). *See United States v. Bakeas*, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997) ("the Human Rights Committee has the ultimate authority to decide whether parties' clarifications or reservations have any effect."); Report of the Committee, 1994 Report, vol. 1, 49 U.N. GAOR, Supp. No. 40, U.N. Doc. A/49/40, para. 5 ("General comments...are intended... [among other purposes] to clarify the requirements of the Covenant...."); *see also United States v. Duarte-Acero*, 208 F.3d 1282, 1285 n.12, 1287-88 (11th Cir. 2000). General comments can be found at http://www1.umn.edu/humanrts/gencomm.

thus, a right of fundamental and preemptive importance), has expressly declared that a state 'may not depart from the requirement of effective judicial review of detention,' and has affirmed that 'the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of the detention must not be diminished by a State party's decision to derogate from the Convention.' Similarly, the Inter-American Court of Human Rights has recognized that judicial guarantees essential for the protection of nonderogable or peremptory human rights are also nonderogable in times of emergency, that the human right to be brought promptly before a judge must be subject to judicial control, and that judicial protection must include the right to habeas corpus or similar petitions and cannot be suspended during a time of national emergency. Finally, the European Court of Human Rights has recognized that detention by the Executive without judicial review of the propriety of detention is violative of fundamental human rights law. Such widespread recognition and the *jus cogens* nature of the right to freedom from arbitrary detention affirm the nonderogability of judicial review and therefore require that the executive branch may not exercise its discretion to detain without independent, fair, and effective judicial review. Indeed, it is difficult to imagine a more arbitrary system of detention than one involving an executive branch unbounded by law and whose decisions are not subject to effective judicial review.

Paust, *Judicial Power*, *supra*, at 507-10, and numerous references cited.

III. The Judiciary Has the Power and Responsibility to Determine the Legal Status and Rights of Detainees

The U.S. judiciary has the power and responsibility under international law, Article III of the U.S. Constitution, and numerous U.S. judicial decisions applying international law, the Bill of Rights, and other legal norms to determine the legal status and rights of persons detained.

A. Judicial Power Exists Under International Law and Article III of the Constitution

The Founders uniformly expected that the customary law of nations, like treaties, was binding, was supreme law, created private and governmental rights and duties, and would be applicable in U.S. federal courts.[4] At the time of the formation of the Constitution, John Jay had written:

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[4]For early views, including those of Bee, Bradford (Att'y Gen.), Chase, Duponceau, Hamilton, Ingersoll, Iredell, Jay, Jefferson, Lee (Att'y Gen.), Madison, Marshall, Mason, Nicholas, Paterson, Randolph (Att'y Gen.), Story, B. Washington, Wilson, Wirt (Att'y Gen.), *see, e.g.*, Paust, *International Law, supra*; *see also* Louis Henkin, *Foreign Affairs and the United States Constitution* 234, 510 n.20 (2ed. 1996); Edwin D. Dickinson, *The Law of Nations as Part of the Law of the United States*, 101 U. Pa. L. Rev. 26, 35-38, 43-46, 48-49, 55-56 (1952); Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1925, 1841, 1846, 1852 (1998).

"Under the national government...the laws of nations, will always be expounded in one sense...[and there is] wisdom...in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government...."[5] In 1792, Attorney General Randolph declared: "[t]he law of nations, although not specially adopted...is essentially a part of the law of the land."[6] In 1793, then Chief Justice Jay recognized that "the laws of the United States," the same phrase found in Article III, § 2, cl. 1 and in Article VI, cl. 2 of the Constitution, includes the customary "law of nations" and that such law was directly incorporable for the purpose of criminal sanctions.[7] That same year it was affirmed that the "law of nations is part of the law of the United States."[8] Chief Justice Jay had also charged a grand jury in Virginia that year in markedly familiar words: "The Constitution, the statutes of Congress, the law of nations, and treaties constitutionally made

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[5]*The Federalist No. 3*, at 62 (John Jay) (J.C. Hamilton ed. 1868).

[6]1 Op. Att'y Gen. 26, 27 (1792). See also 1 Op. Att'y Gen. 68, 69 (1797) ("the law of nations in its fullest extent...[is] part of the law of the land."). *See also The Nereide*, 13 U.S. (9 Cranch) 388, 422-23 (1815), cited in *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980); Paust, *International Law, supra,* at 40 n.44, 41-42 n.45.

[7]*Henfield's Case*, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360); *see also id.* at 1103-04, 1112, 1115. *See also* Dickinson, *supra* note 3, at 46, 56 ("a constituent part of the national law of the United States...," adding: "the Constitution accepted the Law of Nations as national law...." *Id.* at 48); Paust, *International Law, supra,* at 6-8, 34 n.38, 40-48 ns.44-57.

[8]*United States v. Ravara*, 2 U.S. (2 Dall.) 297, 299 n.* (C.C.D. Pa. 1793).

compose the laws of the United States."[9] In 1795, Justice Iredell addressed direct incorporation of customary international law and affirmed the fact of incorporation with or without a statutory base: "[t]his is so palpable a violation of our own law...of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since...." *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159-61 (1795) (Iredell, J.). *See also* 1 Op. Att'y Gen. 566, 570-71 (1822) (law of nations is part of "the laws of the country" and "our laws"). With respect to the broad range of matters subject to incorporation, he added: "all...trespasses committed against the general law of nations, are enquirable...." *Id.* An early case had also expressly related the duty to incorporate customary international law to the Constitution: "courts... [i]n this country...are bound, by the Constitution of the United States, to determine according to treaties and the law of nations, wherever they apply." *Waite v. The Antelope*, 28 F. Cas. 1341, 1341 (D.C.D. S.Car. 1807) (No. 17,045). Later, Chief Justice Marshall affirmed that our judicial tribunals "are established ...to decide on human rights." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810), and human rights precepts have been used since the dawn of the U.S. *See, e.g.*, Paust, *Judicial Power, supra*, at 167-96.

Similar recognitions had occurred previously and would occur throughout our history, demonstrating that application of international law in cases otherwise properly before the courts is emphatically within the province of judicial power and the original intent of the Framers. Quotations from merely a few other Supreme Court decisions round out such recognitions. For example, in 1942 the

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[9]Charge to Grand Jury for the District of Virginia, May 22, 1793.

Supreme Court summarized its practice in ascertaining and applying a portion of customary international law, the law of war:

> From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes...the status, rights and duties of enemy nations as well as of enemy individuals.

Ex parte Quirin, 317 U.S. 1, 27 (1942). As affirmed in *The Paquete Habana*, "International law is part of our law, and *must* be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[10]

The judicial power to identify, clarify and apply customary international law has a constitutional base. Under Article III, § 2, cl. 1 of the Constitution, not only might matters involving customary international law arise under other parts of the Constitution as such or treaties, but they can also arise as and under the phrase "the Laws of the

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[10]175 U.S. 677, 700 (1900) (emphasis added); *see also id.* at 708, 714 ("*bound* to take judicial notice of, and to give effect to" international law; "it is the *duty* of this court") (emphasis added). Concerning little known claims of the Executive, the actual holding in *Paquete Habana*, and more recent errors with respect to the rationale and ruling and misuse of the case, *see, e.g.*, Jordan J. Paust, *Paquete and the President: Rediscovering the Brief for the United States*, 34 Va. J. Int'l L. 981 (1994). *See also Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 261 (1984) (O'Connor, J., opinion) (power "delegated by Congress to the Executive Branch" as well as a relevant congressional-executive "arrangement" must not be "exercised in a manner inconsistent with...international law."); Paust, *International Law, supra*, at 143-46, and cases cited.

United States." As recognized by the first Chief Justice of the U.S. Supreme Court, this same phrase, "the laws of the United States," includes the customary "law of nations." *Henfield's Case*, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J.). Thus, although treaties have an express constitutional base in Article III, a primary base for judicial incorporation of customary international law can be found in the phrase "Laws of the United States" contained in the same Article and also in Article VI, cl. 2, which affirms that both treaties and "the Laws of the United States" are "the supreme Law of the Land."

As the Restatement recognizes: "Matters arising under customary international law also arise under 'the laws of the United States,' since international law is 'part of our law'...and is federal law." Restatement, *supra*, § 111, RN 4; *see also id.*, cmt. e; Paust, *International Law*, *supra*, at 6-7, 41-42 n.45, and numerous cases cited; Paust, *Judicial Power*, *supra* at 514-25. Thus, cases "arising under customary international law" are "within the Judicial Power of the United States under Article III, section 2 of the Constitution" (Restatement, *supra*, § 111, cmt. e); and such law, "while not mentioned explicitly in the Supremacy Clause," is supreme federal law within the meaning of Article VI, cl. 2 (*Id.* § 111, cmt. d). For these reasons, the phrase "laws...of the United States" contained in 28 U.S.C. § 1331 gives the district courts original jurisdiction over all civil cases arising under customary international law. Restatement, *supra*, § 111, cmt. e and RN 4; Paust, *International Law*, *supra*, at 6-7, 43 n.48, and numerous cases cited; Paust, *Judicial Power*, *supra* at 514-25. Thus, a general jurisdictional competence exists to apply customary international law as law of the United States (including "substantive" rights, duties, causes of

action, nonimmunity, and rights to remedies thereunder) under 28 U.S.C. § 1331 whether or not other statutes refer expressly to the "law of nations" or to customary international law and, thus, provide additional bases for federal jurisdiction or additional substantive law.

Throughout our history, fundamental human rights have also conditioned the meaning of due process under the Fifth Amendment (*see, e.g.*, Paust, *International Law*, *supra*, at 192-93, 196, 248 n.392, 254-55 n.459, and cases cited; *see also Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388-89 (10th Cir. 1981)), and have been used as aids to interpret the content of other amendments (*see, e.g.*, Paust, *International Law*, *supra*, at 5-6, 34 n.37, 192-96, 246-55), especially the Fourth Amendment concerning unlawful seizures and detention (*see, e.g.*, *id.* at 195, 248 n.392, 251 n.425, quoting especially *Henry v. United States*, 361 U.S. 98, 101 (1959) ("arrest on mere suspicion collides violently with the basic human right of liberty.")). The very purpose of the Ninth Amendment was to guarantee unenumerated human rights to all of our citizens. As demanded and expected by the Framers, human rights are our own, *see, e.g.*, *id.* at 323-26, 331-35, 339-40, *passim*, and such human rights can also clarify the meaning of the Fifth Amendment. No one doubts that Mr. Padilla is entitled to due process of law under the Fifth Amendment. His customary and treaty-based fundamental human right to independent, fair, effective, and meaningful judicial review of the propriety of his detention should also be used as an aid for interpretation of the contours and meaning of his due process rights under the Fifth and Ninth Amendments. The U.S. Constitution has had significant impact abroad shaping human demands and expectations, particularly with respect to an evolved and

global meaning of due process under customary human rights law. For U.S. courts, evolved international due process requirements will be familiar.

Since international law is law of the United States in several senses noted above, the judiciary also has the power to take judicial notice of and, thus, to identify and clarify customary international law. *See* Paust, *International Law*, *supra*, at 7, 46-47 n.53, and cases cited. More importantly, such attributes of international law and judicial power compel recognition that the judiciary is bound to identify, clarify and apply customary international law in cases or controversies otherwise properly before the courts. As Justice Gray recognized in *Hilton v. Guyot* (and would reiterate in *The Paquete Habana*):

> International law in its widest and most comprehensive sense...is part of our law, and *must* be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

Hilton v. Guyot, 159 U.S. 113, 163 (1895) (emphasis added).

Similar recognitions have existed throughout our early history (*see, e.g.*, Paust, *International Law*, *supra*, at 8, 47 n.56, and cases cited), and have found expression in more recent federal opinions. *See, e.g.*, *id.* at 8, 47-48 n.57, and cases cited; *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. at 798-800. U.S. courts have also considered decisions of international courts and commissions as well as foreign courts addressing human rights in order to clarify human rights protected through our Constitution and various statutes. *See, e.g.*, Paust, *International Law*, *supra*, at 3-4,

19-21 n.17, 25-26 n.23, and cases cited; *see also Lawrence v. Texas*, 123 S.Ct. 2472 (2003) (re: liberty interest, due process).

B. Judicial Power Is Recognized in Case Law

More specifically, issues concerning prisoner of war and other status, the propriety of detention, and provisional characterizations by the Executive during war have been reviewed by numerous courts according to international legal standards regardless of the alleged status of the detainee.[11]

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[11]*See, e.g.*, *Ex parte Quirin*, 317 U.S. at 25, 27 (whether or not so-called unlawful combatants); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866) (despite insistence "that Milligan was a prisoner of war, and therefore excluded from the privileges of the statute," the Court concluded: "[i]t is not easy to see how he can be treated as a prisoner of war" under the facts); *id.* at 134 (Chase, C.J., dissenting) ("Milligan was imprisoned under the authority of the President, and was not a prisoner of war," thus demonstrating that the Court ultimately determines such status); *United States v. Guillem*, 52 U.S. (11 How.) 47 (1850); *The Nereide*, 13 U.S. (9 Cranch) 398, 429 (1815); *Colepaugh v. Looney*, 235 F.2d 429, 431 (10th Cir. 1956) (regarding "access to the courts for determining the applicability of the law of war to a particular case," the Executive "could not foreclose judicial consideration of the cause of restraint, for to do so would deny the supremacy of the Constitution and the rule of law under it as construed and expounded in the duly constituted courts of the land. In sum, it would subvert the rule of law to the rule of man."), *cert. denied*, 352 U.S. 1014 (1957); *In re Territo*, 156 F.2d 142 (9th Cir. 1946); *United States v. Noriega*, 808 F. Supp. 791, 793-96 (S.D. Fla. 1992); *id.*, 746 F. Supp. 1506, 1525-29 (S.D. Fla. 1990); *Ex parte Toscano*, 208 F. 938, 942-44 (S.D. Cal. 1913) (Executive detention of belligerents from Mexico during a Mexican civil war was appropriate under Article 11 of the Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, T.S. No. 540, 36 Stat. 2310 (18 Oct. 1907), and was not

In response to claims in *Ex parte Quirin* that Executive

unreasonable under the circumstances, including "admitted facts"; habeas "petitioners are completely within the provisions" of the treaty; and it was the President's "duty to execute said treaty provisions."); *Ex parte Orozco*, 201 F. 106, 111-12 (arrest and imprisonment without trial of a person suspected of organizing an expedition against Mexico in violation of neutrality "merely upon an order directed by the President" were illegal and "[could not] be sustained in a court of justice," and "conditions then existing repelled the thought that the intervention of the military was necessary to the administration of justice," "civil courts...were competent to deal with all disturbers of the peace and with all persons offending against the neutrality," and it was the duty of the military to deliver the detainees "to the civil authorities"), 118 ("assaults of arbitrary power" are impermissible and despite the fact that the President "has earnestly and persistently endeavored to enforce" neutrality and "was actuated by the high motive to faithfully execute the laws," such considerations "should not affect the determination of legal questions" and, under the circumstances, there had been an "unlawful exercise of power") (W.D. Tex. 1912); *id.* at 111, also *quoting* 21 Op. Att'y Gen. 267, 273 (1895) ("'executive has no right to interfere with or control the action of the judiciary'" concerning "proceedings against persons charged with being concerned in hostile expeditions"); *In re Fagan*, 8 F. Cas. 947, 949 (D.C.D. Mass. 1863) (No. 4,604) (re: "persons detained under military authority as soldiers or prisoners of war, or spies," "[t]he writ of habeas corpus is unquestionably applicable to all these cases, and had long been actually and frequently used therein."); *In re Keeler*, 14 F. Cas. 173, 175 (D.C.D. Ark. 1843) (No. 7,637) (court will decide if detention is unlawful, will consider "the circumstances," and decide whether "reasonable grounds" support the habeas petition, but if "upon his own showing" petitioner is "clearly a prisoner of war and lawfully detained" denial of habeas is proper; moreover, "a strong case ought to be made out" by the petitioner so as not to unduly interfere with lawful military authority); *Juando v. Taylor*, 13 F. Cas. 1179, 1183 (D.C.S.D.N.Y. 1818) (No. 7,558) ("the parties in this war must be considered as regularly at war under...protection of the...laws of war; to be treated as prisoners of war"); *Respublica v. Chapman*, 1 U.S. 53, 59 (S.Ct. Pa. 1781) ("Those persons were, accordingly, treated as Prisoners of War."), and other cases cited in Paust, *Judicial Power*, *supra* at 518-25 & n.71, 525-26.

decisions are determinative and that, in any case, enemy aliens being detained should be denied access to courts (317 U.S. at 23), the Supreme Court was emphatic that "neither the [President's] Proclamation nor the fact that they are enemy aliens forecloses considerations by the courts of petitioners' contentions...." *Id.* at 25. Indeed, as *Ex parte Quirin* recognizes, legal status and rights under international law are matters of law within the ultimate prerogative of the judiciary. See also Part III.A.

U.S. courts have also made final determinations concerning the propriety of seizures of persons abroad in violation of international law[12] and have made final determinations concerning the seizure of enemy or neutral property in time of armed conflict, often in conflict with the determinations of the Executive branch.[13] In *Brown v.*

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[12]*See, e.g., Eord v. United States*, 273 U.S. 593, 606 (1927) (Executive branch violation of a treaty would affect jurisdiction); *United States v. Toscanino*, 500 F.2d 267, 276-79 (2d Cir. 1974), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974) (also *quoting Shapiro v. Ferrandina*, 478 F.2d 894, 906 n.10 (2d Cir. 1973) (courts should assure "that the Executive lives up to our international obligations")); *United States v. Yunis*, 681 F. Supp. 909, 914-15 (D.D.C. 1988); *id.*, 681 F. Supp. 896, 906 (D.D.C. 1988) ("The government cannot act beyond the jurisdictional parameters set forth in principles of international law...."); *United States v. Ferris*, 19 F.2d 925, 926 (N.D. Cal. 1927) (Executive seizure, in violation of customary "international law" and a treaty, obviated jurisdiction and is "not to be sanctioned by any court"); Paust, *Judicial Power*, *supra* at 518-25 & n.72. *See also United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (Rehnquist, C.J.); *Cook v. United States*, 288 U.S. 102 (1933) (seizure of ship in violation of treaty).

[13]*See, e.g., The Paquete Habana*, 175 U.S. 677 (1900) (regarding illegal seizures and detention of enemy ships, cargo and crew outside the United States in time of armed conflict); *Brown v. United States*, 12 U.S.

United States, Justice Story affirmed that the President during war "has a discretion vested in him, as to the manner and extent, but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers, or authorize proceedings, which the civilized world repudiates and disclaims." 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting).[14] Later, in *Sterling v.*

(8 Cranch) 110 (1814); *The Flying Fish*, 6 U.S. (2 Cranch) 170 (1804); *see also Juragua Iron Co. v. United States*, 212 U.S. 297 (1909); *United States v. Lee*, 100 U.S. 196, 219-21 (1882); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 314-16 (1870) (Field, J., dissenting) ("The power to prosecute war...is a power to prosecute war according to the law of nations, and not in violation of that law."); *The Prize Cases*, 67 U.S. (2 Black) 635 (1862) (judicial determination of the propriety of a blockade and seizures under the laws of war, and the President "is bound to take care that the laws be faithfully executed," including the laws of war); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (The President cannot authorize seizure of a vessel in violation of a treaty); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (war's "extent and operations are...restricted by...the law of nations"); *Johnson v. Twenty-One Bales*, 13 F. Cas. 855, 863 (C.C.D.N.Y. 1814) (No. 7,417); *Elgee's Adm'r v. Lovell*, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4,344) (Miller, J., on circuit) (concerning the "law of nations, ...no proclamation of the president can change or modify this law"); 11 Op. Att'y Gen. 297, 299-300 (1865) (laws of war and more general laws of nations "are of binding force upon the departments and citizens of the Government" and neither Congress nor the Executive can "abrogate them or authorize their infraction."); Paust, *Judicial Power*, *supra*, at 518-25 & n.73; *see also* Paust, *International Law*, *supra*, at 143-46. *Bas* also involved a judicial determination whether a war existed and who was an "enemy." *See* 4 U.S. (4 Dall.) at 39 (Moore, J.), 40-42 (Washington, J.), 43-45 (Chase, J.), 46 (Paterson, J.).

[14]The majority did not disagree and affirmed that while exercising presidential discretion, the Executive can only pursue the law. See *id.* at 128-29 (Marshall, C.J.). For uniform views of the Founders and other cases recognizing that the President is bound by international law, *see,*

Constantin, the Court affirmed that the line between permissible discretion and law is one that must be drawn by the judiciary:

> It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the... [Executive] may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, ... is conclusively supported by mere executive fiat. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken... [but] the officer may show the necessity in defending an action... [before the judiciary].

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e.g., Paust, *International Law, supra*, at 143-46, 155-60 ns.6-38. *See also* former Legal Advisor, U.S. Dep't of State, Monroe Leigh, *Is the President above Customary International Law?*, 86 Am. J. Int'l L. 757, 760, 762-63 (1992) ("When the President orders a violation of customary international law,...he abuses his discretion and may be compelled by"...the courts to obey the dictates of customary international law.").

287 U.S. 378, 400-01 (1932).[15] The Court quoted *Mitchell v.*

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[15]Concerning the extent of judicial review, *see also id.* at 403: "the findings of fact made by the District Court are fully supported by the evidence"; *United States v. United States District Court*, 407 U.S. 297, 316-17 (1972) (members of the Executive branch "should not be the sole judges" of their actions despite an Executive claim that a wiretap to gather intelligence was "a reasonable exercise of the President's power...to protect the national security." *Id.* at 299-301); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146-47 (1948) (Jackson, J., concurring); *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (Black, J.) ("'we cannot reject as unfounded the judgment of the military'" and there is "'ground for believing,'" *quoting Hirabayashi v. United States*, 320 U.S. 81, 99 (1943) (which also stated that in context, "[v]iewing these data in all their aspects," the political branches "could reasonably have concluded"; *id.* at 98)); *id.* at 234 (Murphy, J., dissenting) ("it is essential that there be definite limits to military discretion ... the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled...," next quoting *Sterling v. Constantin*, and adding: "The judicial test ... is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (Court decided that there was not sufficient evidence to show that petitioners were levying war against the United States); *Ex parte Merryman*, 17 F. Cas. 147, 148-50 (C.C.D. Md. 1861) (No. 9,487); *United States ex rel. Zdunic v. Uhl*, 137 F.2d 858, 861 (2d Cir. 1943) (regarding Executive detention of an alleged German enemy alien, "[o]n these and any other disputed facts he is entitled to a judicial inquiry before the court can determine whether his relation to the German 'nation or government' brings him within the statutory definition of alien enemies."); *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) ("the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."); *Cruikshank v. United States*, 431 F. Supp. 1355, 1359 (D. Haw. 1977) ("The Government should not have the 'discretion' to commit illegal acts.... In this area, there should be no policy option... [and] there is no exception to this rule for the acts of the CIA"); *Johnson v. Jones*, 44

Harmony, "'Every case must depend on its own circumstances.'" 287 U.S. at 401, *quoting* 54 U.S. (13 How.) 115, 134 (1851).

Judicial review of military actions taken under circumstances of claimed "necessity" during war has also occurred in other cases and involved contextual inquiry whether military actions were required, "reasonable," or plainly justified.[16] Thus, exercise of war or national security powers must not only fall within the limits of law, but also must not take exception in the name of "necessity" or under some theory that the end justifies the means. To this sort of claim, the Supreme Court gave an apt reply in *Ex parte Milligan*:

Ill. 142, 147-48, 160-61 (1867), *quoted* in *Ex parte Orozco*, 201 F. at 115-17; *supra* notes 12-14; *infra* note 17.

[16]*See, e.g.*, *Raymond v. Thomas*, 91 U.S. 712, 716 (1875) (when reviewed under the circumstances, a military order was recognizably arbitrary and void, the court adding: "It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires" as determined by the courts); *United States v. Russell*, 80 U.S. (13 Wall.) 623, 627-28 (1871) (judicial inquiry obtained whether there was "a state of facts which plainly lead to the conclusion that the emergency was such that it justified" an action); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134-35 (1851) (judicial review of military action involves inquiry whether there is "reasonable ground for believing" that a seizure is required and "it is not sufficient to show that he exercised an honest judgment...; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe...."); Paust, *Judicial Power*, *supra* at 518-25 & n.80; *see also* Paust, *International Law*, *supra*, at 143-46, and cases cited; *supra* notes 11-14.

> Time has proven the discernment of our ancestors.... Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law.... The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence....

71 U.S. (4 Wall.) 2, 120-21 (1866). The Court also emphasized that precisely at such times "the President...is controlled by law, and has his appropriate sphere of duty, which is to execute... [and not violate] the laws," *Id.* at 121, adding: "[b]y the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers...." *Id.* at 119.

C. The Standard of Review Must Involve Independent, Fair, Effective, and Meaningful Judicial Review

As overwhelming trends in judicial decision and relevant international law demonstrate, the standard for judicial review must involve independent, fair, effective, and meaningful judicial review of the propriety of detention. See Parts II.B and III.A & B. It can be noted that the District Court in *Padilla* did not use such standards and provided far too much deference to the Executive when alleging that courts should only determine whether the Executive has presented "some evidence" to support detention without trial. 233 F. Supp.2d 564, 610 (S.D.N.Y. 2002). This is not the standard of proof. There must be inquiry into whether detention is reasonably needed under the circumstances. Further, in time of war, there must be independent inquiry into whether detention of certain aliens is absolutely necessary. See Part II.B; Paust, *Judicial Review*, *supra,* at Parts II.A.2 & C.2 and III.C.2. *Padilla II* rightly required access to a lawyer, rightly recognized his right to respond (including his right to present facts), and rightly recognized that there must be judicial review beyond the Executive's evidence (see 243 F. Supp.2d 42, 53-54, 56 (S.D.N.Y. 2003); Paust, *Judicial Review*, *supra*, at Part III.C.2), but the "some evidence" standard, even as expanded, is not the correct standard. The District Court also assumed in error (per dicta) that if Padilla had been captured abroad in a zone of active combat operations that he would have no right to present facts. 243 F. Supp.2d at 56-57. *Compare* cases *supra*, notes 15-20. Statements in *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003), clearly contrary to venerable

Supreme Court precedent noted herein, that Hamdi was "not entitled to challenge the facts presented" by the Executive and that judicial "inquiry must be circumscribed to avoid encroachment into...military affairs" (*id.*. at 473), were clearly in error and threatening to civil liberties. There must be a proper check on Executive power in wartime based upon law when liberty and other legal rights are directly in peril, as required by independence and responsibilities of the judiciary under Article III of the Constitution, the Fifth Amendment, and various international laws noted above.

CONCLUSION

For the foregoing reasons, we support the decision of the Second Circuit in *Padilla*. Further, the legal errors and misstatements by the District Court in *Padilla* concerning judicial review of the propriety of detention and standards for judicial review should not guide inquiry, and proper legal standards for independent, fair, effective, and meaningful judicial review should be utilized.

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No. 03-1027

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In The

Supreme Court of the United States

DONALD H. RUMSFELD, Secretary of Defense,

Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN, as Next Friend Of Jose Padilla,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE OTHERS ARE US AND JONATHAN WALLACE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE*

Others Are Us and Jonathan Wallace respectfully submit this brief as *amici curiae* in support of Respondent's assertion that the Court of Appeals correctly granted the *habeas corpus* petition and held the detention of Respondent Jose Padilla to be illegal under the Constitution and laws of the United States.

Others Are Us is a New York state nonprofit corporation with federal 501(c)(3) status, based in New York City. The Others Are Us mission involves "using the arts as a vehicle for bringing individuals from different countries, cultures, backgrounds and beliefs together in community to establish mutual understanding, tolerance and cooperation." (From the Others are Us web site at *www.othersareus.org*.) The organization's current initiative, "Imagining You and Your World", enlists students in schools in the Arab world, Israel and the United States to exchange art and email with one another. In pursuit of this mission, Others Are Us works with, and the nonprofit's president has visited, schools and organizations in countries including Egypt, Israel and the Occupied Palestinian Territories.

Others Are Us executives and board members are well aware that, in the current political climate, such activities coordinated with schools and nonprofit organizations in Arab countries may be regarded with suspicion. Others Are Us engages in no illegal activities, but is well aware that it may fall under suspicion of doing

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* The parties have consented to the filing of this brief. Their letters of consent are being lodged herewith. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation and submission of this brief.

so. Others Are Us' president, Annette Swierzbinski, has already had the experience of being visited by law enforcement authorities interested in questioning her about the organization's contacts overseas. In the event of a law enforcement misunderstanding about the legitimacy of the organization's activities in support of international tolerance, understanding and cooperation, Others Are Us members place great reliance in the procedural safeguards guaranteed by the U.S. constitution, and are highly concerned by their apparent suspension in the case of Jose Padilla. They believe that, if the government's position in the case is upheld, anyone merely suspected, without hard evidence, of illegal activities related to the Arab world could disappear into federal custody, without access to an attorney or other safeguards allowing them to establish their innocence.

Wallace, an attorney admitted to the bar of this Court, is the editor and publisher of *The Ethical Spectacle*, *http://www.spectacle.org*, a monthly Web-based publication which has been extremely critical of the policies and actions of this administration. Wallace has written and spoken out against the war in Iraq and the administration's disregard for the civil liberties of Americans. Wallace has also attended demonstrations in New York City against the Iraq war, and wrote a statement which was read at an antiwar demonstration in New Jersey. Wallace has been the subject of unwelcome law enforcement attention on a number of occasions, including illegal search of his person and possessions, and interference with his right of assembly. As an American citizen, Wallace relies on the U.S. Constitution to protect him from government overreaction to his exercise of the rights of free speech and peaceful assembly. Wallace believes that the government's

arguments pertaining to Padilla could be used to justify the detention of any American on secret evidence.

Others Are Us and Wallace therefore file this *amicus* brief in support of respondent's rights of due process.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

Respondent Jose Padilla is a United States citizen, detained by the government upon arrival at a Chicago airport and held incommunicado in a military brig, without access to attorneys or notice of the charges against him. The Department of Defense, which has custody of Padilla, justifies its detention by labeling him an "enemy combatant". The executive branch, which denies the jurisdiction of this Court to consider Padilla's *habeas corpus* petition, has in effect acted both as legislature (determining the definition of "enemy combatant" and the rules under which such persons may be detained and held) and judge with regard to Padilla (determining the length of his detention, and the circumstances, if any, under which he may be advised of the charges against him, brought before a tribunal, and punished).

Amici argue that in arrogating to itself the right to discharge the functions of all three branches of government as pertains to Padilla's detention, the executive branch is acting in willful disregard of the clear intention of the Framers of the Constitution. The Framers knew that the executive power could not be trusted, being subject to corruption through the exercise of unchecked power. The Framers wisely created a system of checks and balances to keep the executive from infringing on the liberties of citizens

guaranteed by the Constititution. The executive, in claiming the right and ability to dispose of Padilla without clear authorization by the legislature and without judicial review, is asking for a absolute degree of trust which would have offended the Framers.

ARGUMENT

I.

DISTRUST OF EXECUTIVE POWER IS A CORNERSTONE OF THE AMERICAN CONSTITUTIONAL SYSTEM

The Framers of the United States Constitution were extremely aware of the propensity of rulers to become corrupted by power. Accordingly, they carefully crafted a system in which the three branches of government check each other to avoid this outcome. As James Madison wrote in *The Federalist* no. 47 (Jacob E. Cooke, ed., Wesleyan University Press 1961) (1787-1788):

> The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

He then cited Montesquieu, whom he regards as being the great progenitor of the concept of separation of powers:

> Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*. Were it

> joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.

In *Federalist* 48, Madison cited Thomas Jefferson, in *Notes on the State of Virginia:*

> All the powers of government, legislative, executive and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government... An *elective despotism*, was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.

Madison concluded in *Federalist* 51 that the government's "several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the dangers of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on

human nature, that such devices should be necessary to controul the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.

Madison concluded: "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other..."

The Framers devoted much attention to the benefits and dangers of a strong executive. In *Federalist* no. 70, Alexander Hamilton, while acknowledging the need for a strong executive able to act rapidly and with secrecy in appropriate circumstances, noted that the executive power must be counterbalanced by "Ist. a due dependence on the people, secondly a due responsibility."

Hamilton observed that a single strong executive can more easily be held responsible for error than a committee: "it is far more safe that there should be a single object for the jealousy and watchfulness of the people...."

In *Federalist* 84, Hamilton described the Constitution's provisions protecting individuals against the most despotic exercise of power imaginable, that of deprivation of life or liberty without trial. "[T]he practice of arbitrary imprisonments," he said, has "been in all ages the favourite and most formidable instruments of tyranny."

> The observations of the judicious Blackstone in reference to the latter, are well worthy of recital. "To bereave a man of life (says he) or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government." And as a remedy for this fatal evil, he is every where peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls "the BULWARK of the British constitution."

This Court has several times been called upon to resolve disputes involving the exercise of extraordinary executive power in wartime. It has usually done so with complete regard to the Framers' warnings about the importance of distrusting the unchecked actions of the executive branch. In *Ex Parte Milligan*, 71 U.S. 2 (1866), the Court was called upon to resolve, via a habeas corpus petition,

the legality of the appellant's trial and condemnation to death by a military tribunal upon a charge of treason against the United States during the Civil War. Milligan was a U.S. citizen who had been a resident of Indiana for twenty years. He had never served in the U.S. military, nor had he ever been a resident of any of the states opposing the federal government during the Civil War. The Court, in granting the writ, correctly noted that the case "involves the very framework of the government and the fundamental principles of American liberty." *Id.* at 109. "[I]t is the birthright of every American citizen, when charged with crime, to be tried and punished according to law... By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people." *Id.* at 119.

The Court noted that the Framers "secured in a written constitution every right which the people had wrested from power during a contest of ages." *Id.* at 119.

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.
>
> *Id.* at 120.

The Court concluded, in language that appears to control the present case and require affirmation of the holding below, that there was no justification, in the laws of war or elsewhere, for military tribunals in a state which "upheld the authority of the government, and where the courts are open and their process unobstructed." *Id.* at 121. Also, "no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in no wise connected with the military service." *Id.* at 121-122.

> [U]ntil recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack....[It is] a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity.
>
> *Id.* at 123.

The Court rejected the argument that martial law allows the executive power, acting through its military commanders, to "substitute military force for and to the exclusion of the laws" and to punish individuals "without fixed or certain rules". *Id.* at 124. This, the Court said, would lead to the conclusion that "republican government is a failure, and there is an end of liberty regulated by law." *Id.* This concept of martial law and the Framers' idea of the preeminence of the civil liberties guaranteed by the Constitution, are "irreconcilable; and in the conflict, one or the other must perish." *Id.* at 125.

In 1946, in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), this Court over-ruled the U.S. military's exercise of martial law in Hawaii after Pearl Harbor. A military governor shut the civil courts, suspended habeas corpus, and prevented the use of juries, and then proceeded to try by military tribunal offences such as assault and embezzlement committed by civilians. This Court noted that "the term 'martial law' carries no precise meaning." *Id.* at 315. It is not mentioned in the Constitution, and no act of Congress has defined it. The Court held that "military trials of civilians charged with crime, especially when not made subject to judicial review, are....obviously contrary to our political traditions and our institution of jury trials in courts of law...." *Id.* at 317. "People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule which, according to the Government, Congress has authorized here." *Id.* at 319. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government." *Id.* at 322.

The Court again considered the war time powers of the executive branch in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The Court held that President Truman's order seizing the steel mills was effectively an act of law-making. "[L]ike a statute, [it] authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution." *Id.* at 588. The Court noted that the Constitution's prescription that the President see that the laws are faithfully executed "refutes the idea that he is to be a lawmaker." *Id.* at 587. It

invalidated the President's seizure order, noting that "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times" based on "fears of power and the hopes for freedom." *Id.* at 589.

Justice Frankfurter, concurring, pointed out that the need for action is not enough in itself to create emergency power in the President.

> Absence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law. *Id.* at 603-604.

Justice Jackson, concurring, said that the argument that special executive powers exist when necessary to meet an emergency

> asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.
>
> *Id.* at 649-650.

The clearly stated philosophy of the Framers, in fashioning our Constitution, was that the unchecked

exercise of power corrupts a ruler, and that the three branches of government should serve to balance each other in order to avoid this outcome. More plainly put, the Framers believed that government, without checks and balances, is inherently untrustworthy, due to the problems of human nature ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary"). Thus, the petitioner's extraordinary seizure and continuing custody of Jose Padilla, coupled with the petitioner's insistence that its actions are not reviewable by the courts via habeas corpus or otherwise, are directly contrary to the philosophy of the Federalist and this Court's cases cited above.

II.

PETITIONER IS ASKING FOR AN INAPPROPRIATE AND EXCESSIVE DEGREE OF TRUST

Petitioner, in justifying its seizure of Padilla and insisting that its actions are not reviewable by the courts, is asking for a degree of trust unprecedented in the American system, and highly inimical to the philosophy of the Framers as expressed in the Federalist. Petitioner is claiming the right to legislate its own rules for the extrajudicial seizure and holding of American citizens, to execute such arrests, and then detain these citizens indefinitely without trial. In other words, the petitioner is insisting upon the right to act as legislature and court in addition to performing its executive duties, while maintaining that neither of the other branches of government is

competent to intervene and review its treatment of Padilla.

Petitioner's acts therefore constitute the exact behavior warned against by the Framers and the philosophers upon whom they drew. John Locke, in *The Second Treatise of Government* (Thomas P. Peardon ed., Prentice Hall 1952) (1690) a work much relied upon by the Framers, said:

> it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community contrary to the end of society and government....

Id. at section 143.

In *Common Sense* (Isaac Kramnick ed., Penguin Classics 1986) (1776), his elegant and influential argument to the American colonists that the time had come to separate from England, Thomas Paine argued that kings are not equipped to exercise absolute judgment because, by their nature, they are insulated from the affairs of the world:

> There is something exceedingly ridiculous in the composition of monarchy; it first excludes a man from the means of information, yet empowers him to act in cases where the highest judgment is required. The state of a king shuts him from the world, yet the

> business of a king requires him to know it thoroughly; wherefore the different parts, unnaturally opposing and destroying one another, prove the whole character to be absurd and useless.

Id. at 69.

He asks trenchantly: "*How came the king by a power which the people are afraid to trust, and always obliged to check?*" *Id.* at 70. Such power, he concludes, can only be human-granted, not divine: "neither can any power, *which needs checking*, be from God." *Id.* But if it is human-granted than it can, and should, be revoked or supervised by humans.

In *Ex Parte Milligan,* 71 U.S. at 125, this Court stated:

> This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right [of military trial of citizens] is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them....[but] they secured the inheritance they had fought to maintain, by incorporating in a written constitution, the

> safeguards which *time* had proved were essential to its preservation.

Petitioner's insistence that it may dispose of Jose Padilla, a U.S. citizen, solely at its own discretion, without authorization of Congress or review by the Courts, sets us on the slippery slope feared by the Framers, and foreseen by this Court in the *Milligan* and *Youngstown* cases.

In its brief filed March 17, 2004, Petitioner argues that Padilla is an enemy combatant who can appropriately be detained without charges or trial by the President pursuant to his war powers. The radical subtext to this argument, not acknowledged by Petitioner, is that the President must be trusted, without judicial intervention or review, to make this determination *as to American citizens detained on American soil, in peaceful areas in which the courts are open, and not immediately engaged in acts of combat when captured.* Petitioner's vague assertion, that the entire United States has been rendered a combat zone by Al Quaeda, is an alarming attempt to cast the executive's war power as broadly as possible, and has no support in the Framer's intentions or this Court's precedent. In *Ex Parte Milligan, supra,* this Court, had it followed the same argument, would have reached an opposite conclusion, holding martial law to be appropriate in Indiana, because a war was being fought elsewhere on the soil of the United States.

The decree of trust requested by Petitioner to make such determinations is completely inappropriate and unprecedented. What it effectively means is that the Department of Defense, acting on presidential

order, could take custody of any American citizen, and hold him or her incommunicado, based on secret evidence such as that contained in the classified Mobbs Declaration. Under the interpretation of the Constitution and laws urged by the Petitioner, the implication that the executive power will detain without trial or access to attorneys only citizens who deserve it, while not mistakenly or maliciously detaining your next door neighbor, your sibling or child, or you yourself, is based on a blind trust of the government which is wholly inappropriate under the Constitution. The Framers wisely designed the system's checks and balances, not merely to obviate the need for such a degree of trust, but because they knew that such trust of executive power without any countervailing force has led to disastrous results through-out history. As Justice Jackson said in his concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. at 640: "The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."

CONCLUSION

The decision of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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No. 03-1027

In The

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DONALD RUMSFELD, SECRETARY OF DEFENSE,
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JOSE PADILLA AND DONNA NEWMAN, AS NEXT FRIEND OF JOSE PADILLA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL LAW, CENTER FOR CONSTITUTIONAL RIGHTS, AND NATIONAL LAWYERS GUILD IN SUPPORT OF RESPONDENT

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April 9, 2004

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H.R. 234, 92nd Cong. (1971) 3

Prohibiting Detention Camps: Hearings on H.R. 234 and Other Bills Prohibiting Detention Camps Before the House Comm. on the Judiciary, 92nd Cong., 2d Sess. (1971) 6, 11, 12, 20-22

117 Cong. Rec. 31534 et seq. (1971) 6, 11, 12, 20-22

147 Cong. Rec. S9948 (daily ed. Oct. 1, 2001) 10 n.6

INTEREST OF *AMICI CURIAE*

Amici curiae submit this brief in support of Respondent Jose Padilla, with the written consent of the parties.[1] As listed in the Appendix, *amici* include professors of constitutional law, the Center for Constitutional Rights, and the National Lawyers Guild.

SUMMARY OF ARGUMENT

The military has subjected Jose Padilla—an American citizen arrested on American soil—to prolonged and indefinite incommunicado detention as an enemy combatant, without due process of law or any of the other procedural protections that are guaranteed under the United States Constitution to civilian detainees. Its action is wholly unprecedented. Not only is there no constitutional, statutory, or common law basis for this detention, but the Executive's exercise of its newly asserted powers is proscribed by Congressional legislation that expressly bars such detention. In enacting the Non-Detention Act of 1971, 18 U.S.C. § 4001(a) (2000), Congress reaffirmed the body politic's determination never again to repeat the shame of the military internment of 110,000 individuals of Japanese ancestry—70,000 of whom were American citizens—during World War II. Neither the Joint Resolution of September 18, 2001, Authorization for Use of Military Force, Pub L. No. 107-40, 115 Stat. 224 (hereinafter "Joint Resolution"), the Department of Defense Authorization Act of 1985, 10

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[1] Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

U.S.C. § 956(5) (2000), this Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), nor the law of war can overcome Congress's clear proscription against the President's use of his Commander-in-Chief powers to detain United States citizens in the domestic arena, far from active combat. The Non-Detention Act, this Court's rulings and the separation of powers doctrine on which our democracy rests preclude the Executive's use of asserted war powers within the United States to deprive citizens of their fundamental right to personal liberty.

ARGUMENT

I. SEPARATION OF POWERS PRECLUDES THE PRESIDENT FROM USING HIS COMMANDER-IN-CHIEF POWERS TO DETAIN JOSE PADILLA AS AN ENEMY COMBATANT IN THE FACE OF CONGRESS'S EXPRESS PROHIBITION IN THE NON-DETENTION ACT, 18 U.S.C. § 4001(a)

This case is governed by the framework set forth in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). Where the President takes "measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.* at 637-38 (Jackson, J., concurring). Here, the President has acted in contravention of the Non-Detention Act, 18 U.S.C. § 4001(a), which precludes the President from using his Commander-in-Chief powers derived from a declaration of

war or authorization to use military force to detain an American citizen seized in the United States absent explicit Congressional authorization. Congress clearly had the constitutional authority to enact this statute.

A. The Non-Detention Act Precludes Both Civilian and Military Detentions of Citizens During Wartime Without Congressional Authorization

In 1971, Congress passed the Non-Detention Act, 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." This text is unambiguous and permits no exceptions to its proscription against executive detentions that are not specifically authorized by statute. *See Desert Palace Inc. v. Costa*, 539 U.S. 90, 93-94 (2003). ("Where . . . [a] statute's words are unambiguous the judicial inquiry is complete.") In directing its prohibition to "the United States" and not any particular civil or military authority acting in its name, the text makes clear its universal application. One choosing to consult its legislative history, moreover, would find the sweeping and universal character of this explicit prohibition fully supported. The legislative history of § 4001(a) reflects Congress's clear intent to deprive the Executive of authority to detain American citizens without explicit statutory authorization during wartime.

The Non-Detention Act was enacted specifically to ensure that the internment of Japanese-Americans following the bombing of Pearl Harbor would not be repeated. Section § 4001(a) had its origins as an amendment to H.R. 234, 92nd Cong. (1971). The purpose of that bill was, as an initial matter, "to repeal the Emergency Detention Act of 1950"

(hereinafter "EDA"). H.R. Rep. No. 92-116, at 2 (1971).[2] Under the EDA, the Executive was authorized in time of war or national emergency to detain persons as "to whom there is reasonable cause to believe will engage in acts of espionage or of sabotage."[3] Internal Security Act of 1950, Pub L. No. 831, 81st Cong. 2d Sess. (Sep. 23, 1950) at § 103, reprinted in H.R. Rep. No. 92-116 at p. 9. The House Judiciary Committee recognized, however, that:

> it is not enough to merely repeal the Detention Act. . . . Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority. It has been suggested that repeal alone would leave us where we were prior to 1950. The Committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an Act of Congress, exists.

H.R. Rep. No. 92-116 at 5. Congress was concerned that the mere repeal of the EDA would result in Congressional silence on the power of the Executive to detain during wartime – and that, out of this legislative vacuum, the courts might imply executive detention powers over citizens in the

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[2] For example, a precursor bill that the Senate passed in 1970, S. 1872, 91st Cong. (1969), simply would have repealed the EDA. S. Rep. No. 91-632 (1969).

[3] The legislative findings preceding the Act stated that a "world Communist movement," organized on a conspiratorial basis, and with the support of the most powerful enemy nation of the United States, had sent agents to enter the United States and engage in "treachery . . . espionage, sabotage, [and] terrorism." Internal Security Act of 1950, Pub L. No. 831 (Sep. 23, 1950) at § 101(1).

next war, under the President's Commander-in-Chief powers. If such a case were to arise, a future President might assert that a wartime detention of American citizens fell into the second part in the framework articulated by Justice Jackson in the *Youngstown* case, where the distribution of power between the President and Congress is "uncertain." 343 U.S. 579, 637 (1952).

To address this concern, Congressman Railsback introduced an amendment to H.R. 234, to "do something affirmatively, other than just the repeal, to make sure that we have restricted the President's *wartime powers*." *Prohibiting Detention Camps: Hearings on H.R. 234 and Other Bills Prohibiting Detention Camps Before the House Comm. on the Judiciary*, 92nd Cong., 1st Sess. 79 (1971) (hereinafter "Hearings") (emphasis added). *See North Haven Bd. of Education v. Bell*, 456 U.S. 512, 526-27 (1982) ("remarks . . . of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction."). Both Congressman Railsback and Congressman Ichord, the Chair of the House Internal Security Committee and the chief opponent of the Railsback Amendment—which eventually passed into law as part of the Non-Detention Act of 1971 and is codified at 18 U.S.C. § 4001(a)—agreed that under the framework established by *Youngstown*, the Railsback Amendment would operate to constrain the President's otherwise broad war powers. Congressman Railsback explained that under this Court's analysis in *Youngstown*, "even though a President might have broad war power, they can be limited by acts of Congress." Hearings at 78. Similarly, Congressman Ichord observed that *Youngstown* "teaches that where Congress has acted on a subject within its jurisdiction, sets forth its policy, and asserts its authority, the President might not thereafter act in

a contrary manner." 117 Cong. Rec. 31544 (1971). For Congressman Ichord, as for Congressman Railsback, the amendment that Railsback introduced would, "under the Youngstown Steel case . . . prohibit even the picking up, at the time of a declared war, at a time of an invasion of the United States, a man whom we would have reasonable cause to believe would commit espionage or sabotage." *Id.* at 31549.

The Government therefore demonstrates its disregard for the history of § 4001(a) when it claims that "the explicit purpose [of § 4001(a)] was to repeal the Emergency Detention Act of 1950." Brief for the Petitioner at 45 (hereinafter "Pet. Br."). That purpose was achieved by Section 2(a) of H.R. 234, which "repeals in toto . . . the Emergency Detention Act." H.R. Rep. No. 92-116 at 5. In contrast, § 4001(a), which was contained in Section 1 of H.R. 234, was designed to go further, to ensure that in future wars, whatever wartime power the President had to detain American citizens believed to be spies or saboteurs would be restricted.

Faced with the fact that the Non-Detention Act was clearly intended to apply to executive detentions during wartime, *see Padilla v. Rumsfeld*, 352 F.3d 695, 718-20 (2d Cir. 2003), the Government argues that § 4001(a) applies only to detention by civilian, and not military, authorities. Pet. Br. at 46. The statute's text, however, is directed to "the United States," not civilian authorities. The government does not, and cannot, cite a single statement in the legislative history of § 4001(a) in support of what would amount to a gaping exception to this clear language. Rather, to support the proposition that § 4001(a) applies only to civilian detention, the government resorts to reliance on language in

a report of the House Committee on Internal Security on a *different* bill, one that was offered as an alternative to the Judiciary Committee's H.R. 234 and that failed to be enacted.[4] *See* Pet. Br. at 46 (No. 03-1027) (citing H.R. Rep. No. 91-1599 (1970)). Congress rejected the House Committee on Internal Security's bill, which opposed the outright repeal of the Emergency Detention Act, and would have left an amended EDA in place. That the Government cites only to a House Committee on Internal Security report pertaining to a rejected bill reflects the paucity of support for its position.

The government next argues that the placement of § 4001(a) in the federal code overrides the plain meaning of the statute's text. Pet. Br. at 46. This argument is similarly unavailing. As the Court of Appeals correctly held, "No accepted canon of statutory interpretation permits 'placement' to trump text, especially where, as here, the text is clear and our reading of it is fully supported by the legislative history." *Padilla*, 352 F.3d at 721-22. Section 4001(b) was drafted decades earlier, in a different era, for different reasons. Whatever may have led Congress to

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[4] The government's error in citing the wrong Committee report is compounded by the misleading manner in which it uses the Internal Security Committee Report. The Government states that Congress recognized that the detention of Japanese-American citizens in World War II involved the exercise of civilian authority rather than military authority. Pet. Br. at 46. In fact, the Internal Security Committee's point was that the "impetus" or motivation for the detentions came from civilian concerns and not out of military necessity. In fact the military was clearly involved in carrying out the exclusion and detentions of the Japanese-Americans during World War II. H.R. Rep. No. 91-1599, at 7.

associate §4001(a) with §4001(b) does not bear on the meaning of § 4001(a).[5] *Id.*

Finally, the Government's effort to draw a distinction between civilian and military detention under § 4001(a) must fail because the categories of persons Congress sought to protect under the Non-Detention Act included persons asserted by the President to be wartime saboteurs and spies. This is the very category of persons that the President now claims to have the power to detain militarily as unlawful enemy combatants. But Congress could not have intended to restrict the President's wartime authority to detain American citizens believed to be saboteurs and spies and at the same time permitted him to retain such authority by merely labeling the alleged saboteur or spy as an enemy combatant and detaining them in a military facility rather than a civilian one.

B. Congress Has Not Authorized Padilla's Detention

As the government concedes, no statute explicitly authorizes the detention of American citizens as enemy

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[5] Section § 4001(b) of Title 18 was passed in 1891, a full 80 years before 1971, when § 4001(a) was passed. *See* Act of Mar. 3, 1891, § 4, 26 Stat. 839, 839, as amended by Act of May 14, 1930, § 2, 46 Stat. 325, 325 and Act of June 25, 1948, § 1. The current section heading was amended in 1971 to denote the division between § 4001's subsections as follows: "1971. Act September 25, 1971, substituted the [current] section heading [('Limitation on detention; control of prisons')] for one which read 'Control by Attorney General'; designated existing provisions as subsec. (b); and inserted subsec. (a)." *See* 18 U.S.C.S. § 4001 (2002), History; Ancillary Laws and Directives, Amendments. Section 4001(b) was left unchanged. *See* H.R. Rep. No. 92-116 at 6. Therefore "the language of neighboring provisions," Pet. Br. at 48, is entirely irrelevant to the interpretation of § 4001(a).

combatants. The government contends, however, that the Joint Resolution authorizing the use of force to respond to the attacks of September 11, 2001, Pub L. No. 107-40, 115 Stat. 224, and the statute appropriating funds relating to the detention of prisoners of war, 10 U.S.C. § 956 (2002), implicitly vest the President with the extraordinary executive detention powers being asserted over Padilla.

The government's arguments cannot be reconciled with due process principles. In a similar context, the Supreme Court has explained that the draconian power to deprive citizens of the fundamental right to liberty must be spelled out in clearest of terms:

> We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

Ex Parte Endo, 323 U.S. 283, 300. The Joint Resolution and appropriations statute cited by the government do not contain the clear and unmistakable language authorizing detention that § 4001(a) demands. Moreover, the government's

interpretation of these documents would contravene the central purpose of § 4001(a).

1. The Joint Resolution Does Not Constitute the Explicit Congressional Authorization to Detain American Citizens Required by the Non-Detention Act

Whether or not, in the absence of § 4001(a), the Joint Resolution could support the government's assertion of power to detain Padilla,[6] the language and history of § 4001(a) unequivocally precludes such a result. The central

[6] Both the timing of the passage of the Joint Resolution—which came just seven days after the attacks—and the Joint Resolution's plain language attest to the fact that Congress intended to restrict its application to those organizations and individuals who participated in the September 11 attacks. The limited discussion surrounding the adoption of the Joint Resolution shows that Congress attempted to limit the use of force it was authorizing in a manner that would preclude its application against Padilla. The text of the resolution authorizes the use of force against only "those nations, organizations or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Joint Resolution. Further, the Congressional Record makes clear that "[t]hose persons, organizations or nations that were not involved in the September 11 attacks are, by definition, outside the scope of this authorization." 147 Cong. Rec. S9949 (daily ed. Oct. 1, 2001) (statement of Sen. Byrd). There was no discussion in Congress of extending the President's power to seize and detain without charge or trial American citizens on American soil. In fact, the Senate deleted a proviso proposed by the White House that would have given the President the authority "to deter and pre-empt any future acts of terrorism or aggression against the United States," demonstrating unequivocally that "[i]t was not the intent of Congress to give the President unbridled authority . . . to wage war against terrorism writ large." *Id.*

purpose of § 4001(a) was to ensure that a declaration of war—or a simple authorization of the use of military force—would not be deemed to provide the President with the authority to detain American citizens without charge or trial, as many tens of thousands of Japanese-American citizens had been detained under President Roosevelt's 1942 Executive Order. Congressman Railsback, who introduced the provision now codified at 18 U.S.C. § 4001(a), explained that the express purpose of the provision was "to try to do something about what occurred in 1942 through President Roosevelt's Executive Order." 117 Cong. Rec. 31550 (1971). Similarly, Congressman Matsunaga, the chief sponsor of H.R. 234, stated that the purpose of § 4001(a) was "to add protective language to existing law in order to prevent a repetition of the type of interference with individual liberty which resulted in the incarceration in American concentration camps during World War II of some 110,000 persons of Japanese ancestry." Hearings at 48. The Second Circuit majority made the observation, which neither the dissent nor the government contested, that "almost every representative who spoke in favor of repeal of the Emergency Detention Act or adoption of the Railsback Amendment or in opposition to other amendments, described the detention of Japanese-American citizens during World War II as the primary motivation for their positions." *Padilla*, 352 F.3d at 720.

If accepted, the Government's argument would lead to the nonsensical conclusion that Congress, in enacting § 4001(a), did not believe that the statute would have precluded the Japanese-American detentions—because the 1941 Declaration of War had provided the requisite Congressional authorization for these detentions. Yet Congress was clear that the enactment of § 4001(a) was

intended to prevent the President from arguing that a Declaration of War gave him the authority to detain American citizens. Certainly, if a declaration of war would not give a future President the authority to repeat President Roosevelt's detention of Japanese-American citizens during World War II, then the much more limited Joint Resolution authorizing President Bush to use force cannot be read to authorize such detentions.

Moreover, the legislative history of § 4001(a) establishes that Congress's purpose in requiring statutory authorization for the detention of citizens was to ensure that citizens would not be detained during wartime without due process and the other procedural protections that are guaranteed under the Constitution to civilian detainees. For Congressman Railsback, H.R. 234 reflected "the intention of the sponsors that we must make clear that the only way a citizen may be detained is in the traditional common law manner—upon probable cause that the detainee has committed a crime against the government." Hearings at 41. Similarly, subcommittee member Congressman Biester supported H.R. 234 because it provided "that no executive authority of this country at any time has the power to detain any person who is a citizen of the United States without the safeguards of the criminal law." *Id.* at 60. Congressman Kastenmeier, the Chairman of the Subcommittee of the Judiciary Committee that drafted the H.R. 234 reported that H.R. 234 would ensure that citizens not "be detained without the benefit of due process, merely by executive fiat." 117 Cong. Rec. 31541 (1971). To Judiciary Committee Chairman Congressman Celler, H.R. 234 "would forbid the imprisonment or detention of citizens by the U.S., except pursuant to legislative authority and due process." *Id.* at 31553. In light of the 1971 Congress's determination to end

the practice of wartime detentions lacking in due process, § 4001(a) must be read as demanding some explicit Congressional determination to override a citizen's due process rights before such rights can be negated. An authorization to use force that does not discuss detention, much less the detention of American citizens, will not suffice.

An examination of the text of § 4001(a) as it was originally proposed also makes clear that Congress intended that this provision require the adoption of a statute explicitly authorizing the detentions of citizens before the Executive could employ this power. H.R. Rep. No. 92-116 at 1. The original proposal provided that "no person shall be committed to imprisonment or otherwise detained except in conformity with the provisions of Title 18." *Id.* The Justice Department objected to the proposed language because it failed to recognize that there was explicit statutory authority for executive detention and incarceration of citizens contained in other titles of the U.S. Code besides Title 18. *Id.* at 4. Rather than attempt to delineate every section of the U.S. Code authorizing executive detention, the Judiciary Committee rewrote the text into its current form, permitting detentions pursuant to an act of Congress, wherever codified. The new language was not designed to change the purpose of the bill, which was to ensure that a citizen not be detained except in accordance with a specific provision of the U.S. Code authorizing such detention. It was simply intended to address the Justice Department's legitimate objection that other provisions of the code besides Title 18 specifically authorized detentions.

Congress's clear purpose in enacting § 4001(a) was to remove whatever wartime authority a President may have

to detain citizens whom he believes to be enemy belligerents in order to prevent a repetition of what happened in 1942. If a declaration of war or a lesser statutory authorization to use force were to be deemed an act of Congress sufficient to meet the statute's requirement for creating authority to detain, the statute's central purpose would be negated. Congress then would have *prohibited* the detention of citizens during times of warfare unless authorized by statute, and concomitantly *permitted* such detentions whenever it authorized warfare. Such an interpretation of § 4001(a) would be contrary to the statute's central purpose and cannot be endorsed. *See, e.g., Kosak v. United States*, 465 U.S. 848, 854 n.9 (1984).

In short, by enacting § 4001(a), Congress expressed a clear public policy against the Executive's detention of citizens, in wartime or in time of peace, even in the case of citizens "likely to engage in espionage or sabotage." H.R. Rep. No. 92-116 at 2. Congress did so at the time of the Vietnam War, when widespread domestic dissent was focused on that war, in the wake of the political assassinations of major political figures, and in the face of domestic terrorism. This Court, in addressing the statute's application, has declared that "the plain language of § 4001(a) prescribes detention *of any kind* by the United States, absent a Congressional grant of authority to detain." *Howe v. United States*, 452 U.S. 473, 480 n.3 (1981) (emphasis in original). Nothing in the legislative history § 4001(a), its text, or its subsequent construction by the courts indicates that its clear proscription can be ignored here.

2. The Department of Defense Authorization Act of 1985, 10 U.S.C. § 956(5), Does Not Constitute the Explicit Congressional Authorization to Detain Citizens Required by the Non-Detention Act

For similar reasons, the government's reliance on an appropriations statute provides no support for the executive branch's creation of a new classification of "enemy combatant." Section 956(5) specifies that it is intended to appropriate funds for "the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the [military] whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of the [military] pursuant to Presidential proclamation." 10 U.S.C. § 956(5) (2002). Nothing in the text of this appropriations statute implies an expanded delegation of detention powers from Congress to the President. On its face, § 956(5) refers only to expenditures. *See Padilla*, 352 F.3d at 724. In addition, the principle is clear from nearly fifty years of this Court's jurisprudence that appropriations bills cannot be interpreted as amending substantive law absent manifest Congressional intent to do so. *See, e.g., Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992).

Finally, in *Endo*, this Court categorically rejected the same argument that the Executive propounds here—namely, that Congress may use an appropriations act to ratify a power that it had the authority to grant in the first instance. In *Endo*, the Executive contended that an appropriations statute funding the War Relocation Authority ratified the Authority's power to detain Japanese-Americans. The Court noted that in order for such a ratification to operate it had to:

> plainly show a purpose to bestow the precise authority which is claimed. We can hardly deduce such a purpose here where a lump appropriation was made for the overall program of the [War Relocation] Authority and no sums were earmarked for the single phase of the total program which is here involved. Congress may support the effort to take care of these evacuees [i.e., detainees] without ratifying every phase of the program.

Endo, 323 U.S. at 304 n.24 (citations omitted). Given that Section § 956(5) does not in any way evince Congress's intent to bestow upon the Executive the authority to detain U.S. citizens indefinitely without charge or trial, the appropriations statute cannot be deemed a ratification of the exercise of this power.

II. THE NON-DETENTION ACT'S PRECLUSION OF THE PRESIDENT'S AUTHORITY TO DETAIN PADILLA IS CLEARLY WITHIN THE CONSTITUTIONAL AUTHORITY OF CONGRESS

The Government argues that an interpretation of 18 U.S.C. § 4001(a) that prohibits Padilla's detention here would raise serious questions as to whether Congress can constrain the basic power to seize and detain enemy combatants in wartime. Pet. Br. at 48. This Court's rulings, and the Constitution's text, have long removed any doubt as to Congress's power to regulate the detention of an American citizen who is seized within the United States, outside of an active theatre of military operations.

A. The Broad Discretion Accorded to the President's Conduct of Military Operations Abroad is Not Accorded to His Actions Addressing Domestic Affairs, Even During Wartime

This Court has long recognized that the distinction between internal and external governmental affairs is a critical factor in determining the scope of the President's constitutional war powers. *Youngstown*, 343 U.S. at 645-46 (Jackson, J., concurring). While great deference is given to the President's authority as Commander-in-Chief to act in external affairs, this Court has never accepted the proposition that the President's Commander-in-Chief authority, standing alone, may be turned inward to intrude upon domestic affairs, even in times of national security threats or undeclared wars. *See Youngstown*, 343 U.S. at 642 (Jackson, J., concurring); *see also id.* at 632 (Douglas, J., concurring) ("[O]ur history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs."); *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring) (reasoning that "[i]n *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact," and that in *Curtis-Wright*, the effect of the President's action was "entirely external to the United States and [falls] within the category of foreign affairs.").

The President's military powers were never intended "to supercede representative government of internal affairs," a proposition that Justice Jackson found "obvious from the Constitution and from elementary American history." *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring). *See also Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814)

(holding that the President could not seize, as enemy property, material found on U.S. land at the commencement of hostilities in 1812 without Congressional authority); *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850) (finding that the President, as Commander-in-Chief, could not annex territory to the United States by virtue of a military conquest unless he received authority from Congress); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866) (military commissions cannot be justified "on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is no unwritten criminal code to which resort can be had as a source of jurisdiction"). In this regard, Justice Jackson declared in *Youngstown* that "no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed force to some foreign venture." *Youngstown*, 343 U.S. at 642. *See also id.* at 644.

It is beyond question that Congress has the constitutional power to regulate the detention of American citizens who are captured within the United States during time of war or military conflict. The Constitution does not limit Congress's war powers to the authorization or declaration of war; rather, it explicitly provides Congress with a panoply of war powers including: (i) the power to "make Rules concerning Captures on Land and Water," U.S. Const. Art. I, § 8, cl. 11; (ii) the sole authority to authorize the seizure of citizens' homes for military purposes during times of war, U.S. Const. Amend. III; and (iii) the exclusive power to authorize the seizure of enemy property within the

United States during wartime. *Brown v. United States*, 12 U.S. at 115-16. Indeed, the Supreme Court, early in its history, affirmed a Congressional statute which limited the President's power during wartime to seize ships on the high seas that were thought to be aiding the enemy. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (finding that Presidential Order did not make seizures legal). If Congress has the authority to limit the President's Commander-in-Chief power to capture ships on the high seas during a time of military conflict, it certainly must have the constitutional authority to limit the President's power to detain American citizens in the United States during wartime.[7] The Government's attempt to raise constitutional doubts as to Congress's power to preclude Padilla's detention without process is spurious.

B. The Plain Meaning of the Non-Detention Act is Consistent With the Limits this Court Has Placed on the Commander-in-Chief's Power to Detain American Citizens

The government argues that the Court of Appeals interpretation of § 4001(a)'s plain meaning cannot stand because it "would preclude the military's detention even of

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[7] Moreover, an early Congress asserted its authority to regulate the President's detentions of prisoners of war even outside of the United States. The Twelfth Congress passed statutes authorizing and regulating the President's detention of Prisoners of War during the War of 1812, and appropriating funds for that specific purpose. *See An Act for the safe keeping and accommodation of prisoners of war*, 2 Stat. 777, 12th Cong., 1st Sess. (1812); *see also An Act concerning Letters of Marque, Prizes, and Prize Goods*, 2 Stat. 759, 12th Cong., 1st Sess., § 7 (1812) (regulating custody and safekeeping of prisoners captured on prize vessels by ships operating under executive commission, and safekeeping and support in subsequent custody of United States marshals).

an American citizen seized while fighting for the enemy in the heat of traditional battlefield combat." Pet. Br. at 48. As an initial matter, this overlooks the fact that an Act of Congress already provides for criminal charges for citizens seized while fighting for the enemy—the treason statute, 18 U.S.C. 2381 ("Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, . . . within the United States or elsewhere, is guilty of treason . . ."). However, the case at hand does not require the Court to determine the outer limits of Congressional power, since Padilla was, of course, not "seized while fighting for the enemy in the heat of traditional battlefield combat." Moreover, the statute's plain meaning does not require the result the Government suggests.

The plain meaning of the statute is that Congress meant to exercise the full extent of its Constitutional power to preclude the executive detentions of American citizens during war or other national emergencies without statutory authorization. Congress explicitly recognized the Constitutional framework provided by *Youngstown*, and intended to occupy the field by precluding executive detentions. "Even though a President might have broad war powers, they can be limited by acts of Congress." Hearings at 78 (statement of Rep. Railsback); *see also* 117 Cong. Rec. 31551 (1971) (statement of Rep. Railsback). Congress also recognized that the president had exercised a common-law power to detain prisoners during the conduct of war—a power which they understood to be limited to "the theater of active military operations," "confined to the locality of actual war"—and intended to leave that power undisturbed. Hearings at 41; *see also* 117 Cong. Rec. 31570 (1971) (statement of Congressman Seiberling). Therefore, unless "Courts are actually closed, and it is impossible to administer

criminal justice according to law," analogous to a domestic battlefield situation, § 4001(a)'s prohibition was meant to apply.[8] *Id.; see also id.* at 31551 (statement of Rep. Railsback that there is only one exception under Milligan—"that of impossibility, that is situations calling for martial law"). The statute thus prohibits executive detention unless martial law exists and the civilian courts are closed. Congressman Coughlin expressed Congress's understanding thus:

> In the case of invasion or insurrection, the President has the power to proclaim martial law and take extraordinary measures to maintain order. There is no argument, to my knowledge, that the President should not possess such power.
>
> The bill simply says that in the absence of a martial law situation and when the courts are functioning, then we should use the judicial process.

117 Cong. Rec. 31777.

The President claims, however, that in the war against Al Qaeda, the battlefield is everywhere, including Chicago. Congress rejected that argument in 1971. First, many Representatives cited *Milligan* and used its language

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[8] This case obviously does not raise any question of whether Padilla was detained where "the courts are actually closed" and martial law applies. The *Hamdi* case does raise the issue, not involved here, of whether a citizen seized in an active theater of military operations can be detained in the United States for many years thereafter without being charged with or tried for committing a crime, such as treason.

of active military operations where the courts are closed to describe where they thought their authority to proscribe detentions ended. *See* Hearings at 40-41 (statement of Rep. Railsback); 117 Cong. Rec. 31551 (1971) (statement of Rep. Railsback); *id.* at 31570 (statement of Rep. Abzug); *id.* at 31779 (statement of Reps. Drinan and Pepper); Hearings at 45 (statement of Rep. Matsunaga); *id.* at 63 (statement of Rep. Anderson). They therefore intended that the plain meaning of the statute apply except where "impossibility" prevented its application. Hearings at 41 (statement of Rep. Railsback); 117 Cong. Rec. 31570 (1971) (statement of Rep. Abzug). Moreover, Congress was fully aware of the total war, global battlefield argument, and explicitly rejected it. The situation Congress explicitly addressed—the detention of Japanese-American citizens during World War II—involved almost precisely the same executive argument made here. There too, U.S. territory had been attacked and military officials believed that further attacks on the West Coast might be imminent; there too, the President and his military commanders claimed that "military necessity" justified the detentions. Congress's indisputable intent to ensure that such detentions never happen again precludes the argument the government makes here that the statute should be read to permit a broad battlefield exemption extending throughout the United States even in the absence of active military operations.

The Congressional reading of the implied limits to its power to preclude the Executive from detaining American citizens comports with this Court's reading of what constitutes a battleground. *See Milligan*, 71 U.S. at 121 (the laws and usages of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process

unobstructed"). In addition to *Milligan*, this Court more recently in *Youngstown* used the language of "day to day fighting in a theatre of war" to determine that the United States was not a battleground to which President Truman would have been able to issue an executive order to seize and operate steel mills. *Youngstown*, 343 U.S. at 587. Five years later in *Reid v. Covert*, Justice Black's opinion held that the military power to try American citizens in tribunals only extended to "an area of actual fighting." 354 U.S. 1, 33-35 (1957). Padilla's detention does not meet that standard.

C. *Quirin* Does Not Support the Executive's Claim of Authority to Detain Citizens Indefinitely Without Any Process by Labeling Them Enemy Combatants

The Government relies heavily on this Court's opinion in *Quirin*, 317 U.S. 1 (1942) as authority for its power to detain Padilla as an enemy combatant and its reading of 18 U.S.C. § 4001(a) as not applicable to this case. *Quirin* provides no such support.

Quirin decided the question of whether "admitted enemy invaders" could be detained "for trial by Military Commission", pursuant to Congressional authorization for such a trial. 317 U.S. at 47; *see also id.* at 18, 29. Here, by contrast, the Government seeks to indefinitely detain without charge or trial a citizen who has never admitted to being an "enemy invader" or belligerent, in the face of a Congressional statute whose plain text forbids such detention.

1. *Quirin* Involved Detention for Trial, Not Detention Without Process

The Government inaccurately claims that "the issue in Quirin was not merely whether the military had jurisdiction to try the saboteurs for violating the laws of war, but whether the military had the authority to detain them in the first place." Pet. Br. at 33. Chief Justice Stone's opinion posed as the "question for decision . . . whether the detention of petitioners by respondent *for trial* by Military Commission . . . is in conformity to the laws and Constitution of the United States." 317 U.S. at 18 (emphasis added). The question of whether an indefinite detention without trial of a citizen who had never been charged with any violation of the laws of war or any criminal statute was lawful was not presented in that case. While the Court did state that unlawful combatants were generally subject to both detention and trial, the question of whether a citizen could be detained, and never charged or tried, simply by a Presidential designation that he was an unlawful combatant was never at issue. Indeed, the Court was careful to frame the issue as detention for trial, or detention and trial, not detention without trial, as is the case here.

This case thus raises very different and far graver constitutional concerns than did *Quirin*. The *Quirin* petitioners were tried and eventually judged to be enemy combatants guilty of violations of the laws of war; the question was the adequacy of the process by which they had been tried. Padilla, by contrast, has been imprisoned for almost two years without any process to determine whether he is indeed an enemy combatant or a wrongfully detained

civilian, and whether he is guilty of any violation whatsoever.

2. The *Quirin* Petitioners Admitted That They Were Enemy Combatants

In *Quirin*, the petitioners admitted that they were enemy combatants. 317 U.S. at 20-23. The *Quirin* Court therefore distinguished *Milligan*'s holding that civilians could not be tried before military tribunals except in times of martial law where the courts were closed because the petitioners, "upon the conceded facts, were plainly within those boundaries" of the jurisdiction of military tribunals. *Id.* at 46. The *Milligan* Court "had no occasion" to decide the more troubling question of whether an American citizen who claims to be a civilian and not an enemy combatant can nevertheless be subject to the jurisdiction of a military trial. *Id.* at 45.

The Constitution and 18 U.S.C. § 4001(a) forbid the imprisonment of American citizens without the safeguards of due process. The *Quirin* Court was obviously concerned that the Executive not be able to discard those safeguards simply by labeling a person an enemy combatant. It therefore held narrowly on the facts of that case that admitted enemy combatants could be tried by military commission where Congress had so provided. It is an impermissiable extension of the holding in *Quirin* that a citizen who claims to be a civilian and not an enemy combatant can be detained without trial or notice of charges based on no more than the President's determination that he is an enemy combatant.

3. The *Quirin* Court Held That Congress Had Authorized the Military Commissions at Issue in That Case

As the Court of Appeals correctly held, the *Quirin* Court declined to determine whether the President had any broad Commander-in-Chief power to try suspected spies before military commissions "without the support of Congressional legislation." 317 U.S. at 29. In *Quirin*, "Congress had authorized trial of offenses against the law of war before such commissions." *Id.* Here, by contrast, as the Court of Appeals held, Congress has expressly disapproved the detention of American citizens by the Executive without due process and pursuant to some explicit statutory authority.

The Government argues that the same Articles of War involved in *Quirin* are currently codified as Article 21 of the Uniform Code of Military Justice. Pet. Br. at p 33. But the Government is not proceeding pursuant to that Article in Jose Padilla's case. Rather, it is proceeding on the President's Commander-in-Chief power stemming from the Joint Resolution. It is precisely that authority that is precluded by 18 U.S.C. § 4001(a).

In sum, nothing in this Court's decision in *Quirin* calls into question the constitutionality of § 4001(a) in proscribing the executive detention of Padilla.

CONCLUSION

For the reasons stated herein, the decision of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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April 9, 2004

AMICI STATEMENTS OF INTEREST

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Geoffrey R. Stone is the Harry Kalven, Jr. Distinguished Service Professor of Law at the University of Chicago. He is the former Dean of the University of Chicago Law School and former Provost of the University of Chicago. He was written extensively in the field of constitutional law and is an editor of the Supreme Court Review.

Peter L. Strauss is Betts Professor of Law at Columbia Law School. He served in the office of the Solicitor General from 1968 to 1971 and has chaired the Separation of Powers Committee (among others) of the ABA's Section on Administrative Law and Regulatory Practice.

The **Center for Constitutional Rights** ("CCR") is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. Founded in 1966 during the Civil Rights Movement, CCR has a long history of litigating cases on behalf of citizens accused of seditious behavior or thought to pose a national security threat during wartime, *see, e.g.*, *United States v. United States District Court*, 407 U.S. 297 (1972). As part of its advocacy on behalf of those whose civil, constitutional and human rights have been violated, CCR represents several British, French, Turkish, Canadian and Australian citizens

detained at Camp Delta in the Guantanamo Bay Naval Station. *See Rasul v. Bush*, 215 F. Supp.2d 55 (D.D.C. 2002), *aff'd sub nom. Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (Nov. 10, 2003).

The **National Lawyers Guild** is a national non-profit legal and political organization dedicated to using the law as an instrument for social amelioration. Founded in 1937 as an alternative to the then-racially segregated American Bar Association, the Guild has a long history of representing individuals who the government has deemed a threat to national security. The Guild represented the Hollywood Ten, the Rosenbergs, and thousands of individuals targeted by the House Un-American Activities Committee. Guild members argued *United States v. United States District Court*, the Supreme Court case that established that Richard Nixon could not ignore the Bill of Rights in the name of national security and led to the Watergate hearings and Nixon's resignation. Guild members defended FBI-targeted members of the Black Panther Party, the American Indian Movement, the Puerto Rican independence movement and helped expose illegal FBI and CIA surveillance, infiltration and disruption tactics (COINTELPRO) that the U.S. Senate "Church Commission" hearings detailed in 1975-76 and which led to enactment of the Freedom of Information Act and other specific limitations on federal investigative power.

ORIGINAL

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,

Petitioner,

—v.—

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution. The New York Civil Liberties Union is one of its statewide affiliates. For more than eight decades, the ACLU has steadfastly adhered to the position that our nation's fundamental commitment to civil liberties cannot be forsaken in periods of national crisis. In support of that position, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Hirabayashi v. United States*, 320 U.S. 81 (1943). The ACLU has also opposed arbitrary and indefinite detention as a violation of due process in many different contexts. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678 (2001). The proper resolution of the issues raised in this case therefore is critically important to the ACLU and its members.

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm dedicated to using trial lawyers' skills and approaches to create a more just society. Through precedent-setting litigation, TLPJ prosecutes cases throughout the country designed to enhance consumer and victims' rights, environmental protection, civil rights and liberties, workers' rights, our civil justice system, and the protection of the poor and powerless. TLPJ appears as *amicus curiae* in this case because it is committed to ensuring that the United States of America continues to provide – and

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[1] Counsel for *amici* have lodged with the Clerk letters of consent to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

stand throughout the world as a beacon for – access to justice.

STATEMENT OF THE CASE

Respondent Jose Padilla has been detained for nearly two years. For most of that time, he has been held *incommunicado* in a military brig. The sole basis of his detention is the President's unilateral declaration that he is an "enemy combatant." According to Petitioner, this designation allows the government to impose indefinite, potentially lifelong detention without ever allowing the detainee to challenge the allegations against him.

On May 8, 2002, Jose Padilla flew, unarmed, on a commercial airline from Pakistan, via Switzerland, to Chicago's O'Hare International Airport. Pet. App. 4a. When he landed, he was arrested by FBI agents executing a material witness arrest warrant issued by the Chief Judge of the United States District Court for the Southern District of New York. *Id.*

Padilla was transferred to New York, where he was held as a material witness in connection with a grand jury investigation of the terrorist attacks of September 11, 2001. He was housed in the Metropolitan Correctional Center's maximum security wing, under the control of the Bureau of Prisons and the United States Marshal Service. *Id.*

On Sunday, June 9, 2002, two days before a scheduled conference on Padilla's motion to vacate the material witness arrest warrant, the government informed the district court *ex parte* that the President had issued an order naming Padilla an "enemy combatant" and transferring his custody to the Secretary of Defense. Pet. App. 5a. The district court vacated the warrant that day and the Department of Defense, without notice to counsel, immediately seized Padilla and transported him to a high

security military brig in South Carolina. *Id.* For the next twenty months, the government denied Padilla all access to counsel or any other nonmilitary personnel.[2] *Id.*

Padilla's appointed counsel immediately filed a habeas corpus petition on his behalf. J.A. 46-58. In an opinion dated December 18, 2003, the Second Circuit directed the district court to issue the writ. Pet. App. 55a-56a. As a threshold matter, the court held that the Secretary of Defense had been appropriately named as a respondent and was properly subject to the district court's jurisdiction. Pet. App. 21a-26a.[3] On the merits, the majority found that the President lacked inherent authority to order Padilla's military detention. Pet. App. 26a-43a. In addition, the majority determined that Padilla's detention was barred by 18 U.S.C. § 4001(a), which prohibits the detention of a United States citizen unless authorized by an Act of Congress. Pet. App. 43a-50a. The majority then rejected Petitioner's claim that the necessary authorization could be found in either the congressional Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), or 10 U.S.C. § 956(5),

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[2] On December 4, 2002, after Padilla had already been in military custody for six months, the District Court ordered the government to allow Padilla and his counsel to meet, subject to government-imposed conditions. Pet. App. 154a-155a. Rather than comply with this order, the government asked the district court to reconsider, resting in part on its assertion that any contact with counsel or family members would undermine the relationship of "dependency and trust" that the government sought to establish with Padilla as part of his interrogation. J.A. 86. When the district court was not persuaded to change its ruling, the government filed an interlocutory appeal. Two months after the Second Circuit issued its decision, and twenty months after Padilla was initially detained by the military, the Department of Defense announced "as a matter of discretion and military authority" that it would permit monitored meetings between Padilla and his counsel. U.S. Dept. of Defense News Release, *Padilla Allowed Access to Lawyer* (Feb. 11, 2004), *available at* http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/releases/2004/nr20040211-0341.html.

[3] Those jurisdictional issues are not addressed in this brief.

an appropriations provision that makes no specific reference to "enemy combatants." Pet. App. 50a-55a. As a result, the court ruled that Padilla must be released from military custody but that the government could transfer him to civilian authorities to be held for criminal prosecution or, if appropriate, as a material witness. Pet. App. 55a-56a.

SUMMARY OF ARGUMENT

Petitioner's contention that Padilla can be indefinitely confined in a military brig without either congressional authorization or meaningful judicial review supposes a very different government than the Framers established. *See* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

The absence of congressional authorization is sufficient to dispose of this case and affirm the decision below. We will not repeat those arguments here, which are set forth in the Second Circuit's opinion. But even if congressionally authorized, Padilla's detention violates two other constitutional principles that neither Congress nor the Executive is free to ignore.

The first principle is so basic that the need to restate it only highlights the radical nature of the government's position in this case: individuals in this country cannot be imprisoned without due process of law. The rule against arbitrary detention traces back to the Magna Carta. As Justice Cardozo explained in one of this Court's most important opinions addressing the contours of constitutional liberty: "Fundamental . . . in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (citations omitted). Here, the government has publicly accused Padilla of serious wrongdoing. If it wishes to detain him on that basis, he is entitled to be formally charged and tried before a jury with the assistance of counsel. So far, the government has provided none of these fundamental rights, although Padilla has now been detained for almost two years.

The second principle, and the focus of this brief, involves the supremacy of civilian authority in our constitutional democracy. This principle also has deep historical roots. In listing their grievances against the English Crown, the Founding Fathers expressly criticized conduct "render[ing] the Military independent of and superior to the Civil power." The Declaration of Independence para. 14 (U.S. 1776). Reflecting that grave concern, the Supreme Court held in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), that the government may not subject civilians to military trials, even in wartime, if the civilian courts are open and functioning.

The government does not and cannot contend that its action in this case has respected those principles. Instead, it insists that it is entitled to disregard these important constitutional values because we are engaged in a war on terrorism. It does so by claiming that the force of *Milligan* has been eclipsed by *Ex parte Quirin*, 317 U.S. 1 (1942), and that *Quirin* provides the government with all of the authority it needs to justify Padilla's indefinite military detention.

Quirin, however, does not support the government's position in this case. By its express terms, *Quirin's* holding was limited to enemy soldiers who forfeited their privileged status by violating the law of war and were therefore subject to military trial and punishment as unlawful combatants. In distinguishing *Milligan,* the government's brief in *Quirin* specifically relied on the distinction between soldiers and civilians to justify its assertion of military jurisdiction. Like

Milligan, however, Padilla is a civilian and not a combatant in any legally meaningful sense. As this Court reasoned in *Milligan*, if "he cannot enjoy the immunities attaching to the character of [a combatant], how can he be subject to their pains and penalties[.]" *Milligan*, 71 U.S. at 131. Moreover, unlike the *Quirin* petitioners, who were convicted by a congressionally authorized military tribunal after an adversary proceeding, Padilla has never been charged or tried in any forum.

In short, *Quirin* was a narrow decision that can and should be confined to its facts, while *Milligan*'s assertion of civilian over military authority established a core principle of constitutional law that this Court has repeatedly reaffirmed. It is *Milligan*, not *Quirin*, that is controlling here. Applying *Milligan* to these facts, it is clear that Padilla's detention is fundamentally at odds with basic values that have defined our nation since its founding.

ARGUMENT

PADILLA'S INDEFINITE DETENTION BY MILITARY AUTHORITIES VIOLATES CORE CONSTITUTIONAL PRINCIPLES

The "tradition of keeping military power subservient to civilian authority" was strong in the minds of the Framers. *Reid v. Covert*, 354 U.S. 1, 40 (1957) (plurality); *see id.* at 23. They were aware that military leaders had overthrown ancient governments, *id.* at 24, and they were familiar with the events that transpired in seventeenth century England, when "our British ancestors took political action against aggressive military rule." *Duncan v. Kahanamoku*, 327 U.S. 304, 320 (1946).[4] This history led Lord Chief Justice Hale

[4] As the Court explained in *Duncan*, "[w]hen James I and Charles I authorized martial law for purposes of speedily punishing all types of crimes committed by civilians the protest led to the historic Petition of Right which in uncompromising terms objected to this arbitrary procedure and prayed that it be stopped and never repeated." 327 U.S. at 320 (footnotes omitted). Further abuse of military authority came under James II, which ultimately led to the ascension of William and Mary, whose rule was conditioned upon adherence to a Bill of Rights that protected the right to jury trial. *Reid*, 354 U.S. at 25-26. More detailed explication of this history is provided in both *Duncan*, 327 U.S. at 319-22, and *Reid*, 354 U.S. at 23-30.

and Sir William Blackstone – men who strongly influenced the Framers – to express sharp hostility to any expansion of the military's jurisdiction. *Reid*, 354 U.S. at 26.[5]

Our nations' Founders themselves experienced military interference with civilian courts, leading to their grievance that "the King had endeavored to render the military superior to the civil power." *Duncan*, 327 U.S. at 320; *accord* The Declaration of Independence para. 14 (U.S. 1776); *see Reid*, 354 U.S. at 27-29. Distrusting "military justice dispensed by a commander unchecked by the civil power in proceedings so summary as to be lawless," *Loving v. United States*, 517 U.S. 748, 765 (1996), they drafted the Constitution to reflect their grave "fear and mistrust of military power" by rendering that power "subordinate to civil authority." *Reid*, 354 U.S. at 29, 30.

[5] In criticizing the use of court martials for the prosecution of soldiers' peacetime violations of domestic criminal laws, Blackstone wrote:

> For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land.

I William Blackstone, Commentaries 413, *quoted in Reid*, 354 U.S. at 26-27; *see also* Matthew Hale, *History and Analysis of the Common Law of England* 40-41 (1st ed. 1713), *quoted in Reid*, 354 U.S. at 27 n.48.

The government's willingness now to blur the lines between civilian and military authority disregards the wisdom, experience, and intent of the Framers and the commands of the Constitution. Even during the most trying times facing our nation, including a bloody civil war, the Court has held fast to the foundational principle that the military not be allowed to usurp civilian authority and subjugate the rule of law. The challenges presently facing our country do not justify turning our back on this important tradition.

A. *Milligan* Continues to Stand for the Constitutional Primacy of Civilian Authority

Milligan arose during the Civil War, when Southern sympathizers in Indiana formed "a powerful secret association, composed of citizens and others . . . under military organization." 71 U.S. at 140 (Chase, C.J., concurring). The government alleged that this group conspired to engage in "insurrection, the liberation of the prisoners of war . . . , the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government." *Id.* Milligan, thought to be a high-ranking member of this paramilitary organization, was arrested by military officers and charged with "conspiracy against the Government of the United States," "affording aid and comfort to rebels against the authority of the United States," "inciting insurrection," "disloyal practices," and "violation of the laws of war." *Id.* at 6-7; *see* William H. Rehnquist, *All the Laws But One* 84 (1998). Although not a member of either the Union or Confederate army, Milligan was tried, convicted and sentenced to death by a military commission. He then filed a habeas corpus petition seeking to be "delivered from military custody and imprisonment, and if found probably guilty of any offence, to be turned over to the proper tribunal for inquiry and punishment; or, if not found thus probably guilty to be discharged altogether." 71 U.S. at 135 (Chase, C.J., concurring).

Presaging the argument it makes today, the government contended in *Milligan* that the unprecedented times then facing the nation – when "almost one-half of its citizens undertook . . . to over-throw the government, and where coward sympathizers, not daring to join them, plotted in the security given by the protecting arms of the other half to aid such rebellion and treason" – both demanded and justified an unprecedented exercise of executive power. *Id.* at 88 (argument of Mr. Butler for the United States). Because the very survival of the nation was at stake, the government argued, the President's powers during the war "must be without limit." *Id.* at 18 ("He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration.").

Despite the government's plea, the Court held that the military lacked jurisdiction to try Milligan and that he was entitled to be discharged. *Id.* at 121-22, 131. The Court rejected the assertion that "in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power . . . to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will* . . . ." *Id.* at 124. The Court cautioned that "[m]artial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power' . . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Id.* at 124-25.

To the claim that military "jurisdiction is complete under the 'laws and usages of war,'" a claim resurrected here by the government, the Court replied:

> It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.

Id. at 121; *see id.* at 121-22 ("[N]o usage of war could sanction a military trial [where the courts are open] for any offence whatever of a citizen in civil life, in nowise connected with the military service."). The majority made clear that the Constitution allowed neither the President nor Congress to authorize the military to assume what was properly a judicial function. *See id.*[6]

[6] The concurring Justices in *Milligan* agreed that the military did not have jurisdiction to try Milligan and that he was entitled to be discharged. 71 U.S. at 132-35 (Chase, C.J., concurring). To reach that conclusion, they focused on the act that had authorized limited suspension of the writ of habeas corpus. The act had required that persons held under the President's authority, other than as prisoners of war, were to be referred by list to the judges of the district and circuit courts and, if the grand jury terminated its session without proceeding against a prisoner by indictment or otherwise, a judge was to order the prisoner's discharge. *Id.* at 133. Discharge was also required for persons whose names were not listed and referred within twenty days after the detained citizen's arrest. *Id.* at 134. The concurring Justices found that Milligan's discharge was required under the terms of the act, for the requisite list had not been furnished and no indictment had been returned against him though more than twenty days had elapsed and the grand jury had closed its session. *Id.*

Though not necessary to their conclusion that Milligan's discharge was required, these Justices expressed their belief that, contrary to the majority's view, Congress could have authorized that military commissions be held in Indiana. *Id.* at 138. However, even this view of congressional power was closely cabined. *See id.* at 140 ("We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists."). Moreover, there was no dispute that the military could not hold or try Milligan in the absence of congressional authorization. The majority and the concurring Justices were thus in

As part of its forceful rejection of military jurisdiction over civilians – even those accused of violating the law of war – the Court also found that Milligan's trial by military commission violated his right to trial by jury, *id.* at 122, a right that is "not held by sufferance, and cannot be frittered away on any plea of state or political necessity." *Id.* at 123. In the majority's view, even the suspension of the writ of habeas corpus did not allow the President or Congress to disturb this constitutionally enshrined safeguard of liberty. *Id.* at 125-126.

Although the Civil War threatened the country's very existence, the Court concluded that wartime anxieties did not justify abandonment of basic constitutional values:

> Th[e Framers] foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law.... The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

Id. at 120-21.

The Court was mindful of the grave threat that Milligan posed during a time when the nation was being torn

agreement that the President had no inherent authority as Commander in Chief to authorize Milligan's detention by military authorities.

apart by war, characterizing his conspiracy to "introduce the enemies of the country into peaceful communities" and overthrow the government as an "*enormous crime*" that warranted the law's heaviest penalties. *Id.* at 130. The Court nonetheless found the government's accusations insufficient to justify departure from constitutional precepts. In a manner that responds as forcefully today to the government's claim for detaining Padilla, the *Milligan* Court explained:

> If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Id. at 122; *see id.* at 127 ("It is difficult to see how the *safety* for the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them.").

In refusing to cede dominion to the military, *Milligan* both affirmed a fundamental constitutional principle and reflected precedent. *See id.* at 128-29 (discussing history and case law supporting the Court's ruling and observing that military arrests and trials during wartime "were uniformly condemned as illegal" by the courts when "our officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service"). Neither the passage of

time nor subsequent decisions have diminished *Milligan*'s holding. *See infra* Section C. It applies as forcefully today as it did for an unprecedented civil war that took more than 600,000 lives.

B. *Quirin* Does Not Sanction the President's Unilateral Imposition of Military Detention in Padilla's Case

In an effort to avoid the dictates of *Milligan*, Petitioner relies almost entirely on *Ex parte Quirin*, 317 U.S. 1 (1942), to support his claim of essentially unreviewable authority to detain Padilla indefinitely without charges or trial. Fairly read, *Quirin* does not go nearly that far.

Quirin involved the military trial of World War II combatants who secretly entered the United States with plans to sabotage military installations. After coming ashore from German submarines, they buried their uniforms and explosives and slipped into the night. They were quickly arrested after one of the would-be saboteurs, with the support of a second, informed the FBI of the group's plot and helped the authorities locate the others. *See* David J. Danelski, *The Saboteurs' Case*, 1 J. Sup. Ct. Hist. 61, 64-65 (1996).

In short order, the men were charged with violations of the law of war and the Articles of War for having discarded their uniforms and crossed enemy lines in civilian dress to engage in sabotage, for giving intelligence to the enemy, for spying, and for conspiracy to commit these offenses. They were tried secretly before a military commission, which found them guilty and imposed sentences of death. In a habeas corpus petition, the saboteurs challenged the military commission's authority to try them. *Ex parte Quirin*, 317 U.S. at 19.

This Court heard arguments in a special session, with the parties filing their briefs the day argument began. Less

than twenty-four hours after the close of arguments, the Court issued a *per curiam* decision upholding the jurisdiction of the military commission. *Ex parte Quirin*, 317 U.S. 1, 18-19, 63 S. Ct. 1 (1942) (providing text of *per curiam* opinion); *see* Danelski, *supra*, at 61. The Court's opinion justifying its decision, 317 U.S. 1, 63 S. Ct. 2 (1942), proved harder to formulate and, by the time it was finally released, six of the saboteurs had already been executed. *See* Danelski, *supra*, at 61. Chief Justice Stone spent more than six weeks drafting the full opinion, a task he described as "'a mortification of the flesh.'" *Id.* at 72 (citation omitted).

Quirin has been much criticized, in part for the circumstances surrounding the Court's decisionmaking process.[7] Most remarkably, perhaps, President Roosevelt had let it be known that he was prepared, if necessary, to execute the saboteurs despite any action taken by the Court. *See* Danelski, *supra*, at 68, 69; Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 Cal. L. Rev. 3, 30-31 & n.150 (2003); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1291 & n.118 (2002); *see also* Danelski, *supra*, at 61, 66, 69 (documenting additional problematic aspects of *Quirin*'s adjudication).

[7] *See, e.g.*, Danelski, *supra*; Louis Fisher, *Military Tribunals: The Quirin Precedent* (Mar. 26, 2002) (Cong. Research Serv. Report); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1290-91 (2002); Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 Mil. L. Rev. 59, 83 (1980).

Justice Frankfurter subsequently described *Quirin* as "not a happy precedent," and Justice Douglas stated: "'Our experience with [the Saboteurs' Case] indicated . . . to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble.'" Danelski, *supra*, at 80 (citations omitted).

Even absent these circumstances that undermine the strength of *Quirin* as precedent, it is readily distinguishable from this case on numerous grounds.

First, *Quirin*'s holding is confined to enemy combatants who are bound by the law of war and subject to military punishment when they violate its rules. Padilla, however, is not a combatant under the law of war. Accordingly, he must be treated as a civilian and cannot be subject to indefinite military detention. The reasoning of *Quirin* simply does not extend to these facts.

The *Quirin* saboteurs were part of the German armed forces while Germany and the United States were at war. Under the law of war, they were subject to the privileges and responsibilities of "combatants." They were therefore entitled to use lethal force against military targets and, if captured, to be treated as prisoners of war as long as their belligerent conduct comported with the law of war. When they changed out of uniform to engage in clandestine operations behind U.S. military lines, they violated the law of war and lost their privileged status as "lawful combatants," allowing the government to try them before a military tribunal. Had they not shed their uniforms, they would have been entitled to be treated as prisoners of war.[8]

[8] The absence of uniform was "essential" to the definition of the offense in *Quirin* only because the combatants were bound to wear one in the first instance. 317 U.S. at 38; *see id.* at 37; *id.* at 35 n.12 (noting that certain acts are "war crimes" when committed in civilian dress behind enemy lines but that "authorities are unanimous in stating that a soldier in uniform who commits [such acts] would be entitled to treatment as a prisoner of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war"). Thus, the violation of the law of war was complete in *Quirin* when the saboteurs crossed enemy lines and changed out of military uniform into civilian dress. It did not matter that they never carried out their plot. But surely the government is not claiming that Padilla's offense was having returned to the United States on a commercial flight and landed in civilian clothes.

In an effort to sustain the only possible justification for Padilla's military detention, the government is compelled to claim that Padilla is a combatant, like the *Quirin* saboteurs. But in making that claim, it has not offered any definition of the term that would provide a limiting principle,[9] and it disregards the definition provided by international law. Specifically, a 1977 Protocol to the Geneva Conventions defines "combatants" as "[m]embers of the armed forces of a Party to a conflict . . . [who] have the right to participate directly in hostilities." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 43(2).[10] Individuals who meet the requirements for combatant status have a qualified right to direct violence against other combatants. If, for example, the *Quirin* petitioners had remained in uniform and fired at

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[9] The fact that criminal defendants in other cases have reportedly been threatened with the "enemy combatant" designation demonstrates both how loosely the term may be defined and the danger of vesting the Executive with such unilateral authority. *See, e.g.*, Dan Herbeck, *2 Defendants Feel Pressure for Plea Deals*, Buff. News, Apr. 6, 2003, at B1. The looming threat of designation can itself inhibit suspects and defendants (and their counsel) from vigorously asserting their constitutional rights as criminal defendants for fear that an aggressive defense may trigger an "enemy combatant" designation and the consequent indefinite detention at issue here. The power claimed by Petitioner thus has significance far beyond the confines of this particular case.

[10] The United States chose not to ratify Protocol I, *see* Ronald Reagan, Letter of Transmittal, Treaty Doc. No. 100-2, 100th Cong., 1st Sess., (1987), *reprinted in* 26 I.L.M. 561 (1987), but that fact does not diminish the relevance of this definition as a guiding principle, especially in light of Petitioner's failure to suggest any other limit on the Executive's claim of apparently boundless discretion to designate "enemy combatants" and replace civilian justice with unreviewable military detention. Furthermore, the United States has recognized that most of the provisions of Protocol I are binding on the United States as customary international law. *See, e.g.* Dep't of the Army, *Operational Law Handbook* 11 (Col. Tia Johnson ed., 2003).

American military personnel after landing in the United States, they would not have violated the law of war and could not have been prosecuted.

The government has alleged that Padilla is "associated" with Al Qaeda, but that allegation (even aside from its vagueness), is not sufficient by itself to establish Padilla as a combatant.[11] Nothing in the public record suggests that Padilla was acting on behalf of any entity that would be recognized as a party to an international armed conflict under the Geneva Conventions, or that Al Qaeda as an organization enforces compliance with the laws of war, two necessary elements of the combatant definition. *See id.* art. 43(1).[12]

The difference between Padilla and the German saboteurs is highlighted by the fact that the *Quirin* petitioners, had they been detected as they landed in uniform, could have been shot on sight. *See* Cyrus Bernstein, *The Saboteur Trial: A Case History*, 11 Geo. Wash. L. Rev. 131, 175 (1943) (describing point in *Quirin* argument when "Justice Jackson observed that if the saboteurs had been shot while landing there would not have been murder. Colonel Royall [representing the petitioners] agreed . . . . "); *see also* Michael Belknap, *Frankfurter and the Nazi Saboteurs*, 1982 Y.B. 65, 69 (reprinting "F.F.'s Soliloquy," a controversial plea for patriotism, in which Justice Frankfurter maintained, *inter alia*, that the saboteurs were "damned scoundrels," "just low-down, ordinary, enemy spies who, as enemy soldiers, have invaded our country and therefore could immediately

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[11] President Reagan explained his unwillingness to submit Protocol I to the Senate for its advice and consent by noting, *inter alia*, that he did not believe terrorists should be granted combatant status. 26 I.L.M. at 561; *see also id.* at 564 (expressing similar views of the State, Defense, and Justice Departments).

[12] For a fuller discussion of the applicable international law rules, see generally the Brief *Amici Curiae* of the Practitioners and Specialists in the International Law of War.

have been shot by the military when caught in the act of invasion").

We do not understand the government to be claiming that it was entitled to shoot Padilla as he deplaned at O'Hare. Because he is not a combatant, Padilla must be treated as a civilian. "There is no intermediate status." *See* Int'l Comm. of the Red Cross, *Commentary to the IV Geneva Convention* 51 (Jean S. Pictet ed., 1958); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 4(1) & 4(3), 6 U.S.T. 3516, 75 U.N.T.S. 287 (1956); Protocol I art. 50.

In *Quirin*, the government emphasized the distinction between soldiers and civilians to justify its assertion of military jurisdiction, and to distinguish *Milligan*. *See, e.g.*, Brief for Respondent at 10, *Ex parte Quirin*, 317 U.S. 1 (1942) ("Milligan never wore the uniform of the armed forces at war with the United States. The petitioners did."). Now, it prefers to obscure that distinction although it was critical to the *Quirin* Court's decision. 317 U.S. at 45. A trial might reveal that Padilla conspired to commit abhorrent acts. But that is a matter for the criminal justice system to resolve, not for the President to declare by designating Padilla an "enemy combatant." Notably, those who were thought to have aided the *Quirin* saboteurs, but who were not part of the German military, were prosecuted in the civil courts. *United States v. Leiner*, 143 F.2d 298 (2d Cir. 1944); *United States v. Cramer*, 137 F.2d 888 (2d Cir. 1943), *rev'd*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943).

Similarly, in describing Milligan, this Court observed:

> [H]e was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

71 U.S. at 131.[13] Those observations apply with equal force to Padilla. To ignore the striking similarity between Padilla and Milligan as well as the crucial differences between them and those fighting for the German armed forces would undermine the limited nature of the *Quirin* decision. *See infra* at 22.

Second, while overlooking the narrow scope of *Quirin*'s actual holding, the government purports to glean from that decision a presidential power that the Court never found. As other *amici* address in greater detail, *Quirin*'s approval of a military trial for enemy combatants charged with violations of the law of war rested on congressional authorization for such trials. *Quirin*, 317 U.S. at 25-30; *see also In re Yamashita*, 327 U.S. 1, 7 (1946) (describing *Quirin* as involving lengthy consideration of acts of Congress creating military commissions). *Quirin*'s explicit statement that it was *not* "determin[ing] to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation," 317 U.S. at 29, dispels any notion that the decision recognizes the inherent power now claimed by the Executive to impose military detention on an American citizen seized on American soil. That claim was reached in *Milligan*, and it was forcefully rejected. 71 U.S. at 121.[14]

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[13] *See* Hale, *supra*, at 40-41 ("[Martial law] was only to extend to Members of the Army, and never was so much indulged as intended to be executed or exercised upon others; for others who were not listed under the Army had no Colour of Reason to be bound by Military Constitutions, applicable only to the Army; whereof they were not Parts, but they were to be order'd and govern'd according to the Laws to which they were subject, though it were a Time of War.").

[14] In this regard, both *Quirin* and *Milligan* accord with a long line of cases holding that the President's wartime authority is closely cabined by congressional authorization for his acts. *See, e.g.*, *Youngstown Sheet*

Third, *Quirin* was decided on the basis of *stipulated* facts establishing that the petitioners were German combatants engaged in unlawful belligerency. 317 U.S. at 20, 36. In this case, by contrast, there is no stipulation and the facts alleged by the government have never been tested.[15] The absence of stipulated facts is important because, as the *Quirin* Court recognized, "there are acts regarded . . . as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by jury." 317 U.S. at 29.

Fourth, the *Quirin* petitioners were at least *tried* for their violations of the law of war. *Cf. Yamashita*, 327 U.S. at 9 ("[W]e held in *Ex parte Quirin* . . . that Congress by sanctioning trials of enemy aliens by military commission for

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& Tube Co. v. Sawyer, 343 U.S. 579 (1952); *The Paquete Habana*, 175 U.S. 677 (1900); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814).

[15] As if to suggest that the Court should trust that enough care has been taken, the government writes extensively of the layers of internal review that, it now claims, preceded the designation of Padilla as an enemy combatant. Pet. Br. at 6-7, 27. However thorough that internal process may have been, the salient fact is that it was conducted entirely by and within the Executive Branch. It therefore cannot be viewed as a constitutionally adequate substitute for independent and meaningful judicial review. Habeas courts have long subjected military detentions to close scrutiny of the factual and legal bases for confinement. *Givens v. Zerbst*, 255 U.S. 11, 19 (1921); *McClaughry v. Deming*, 186 U.S. 49, 62-63 (1902); *In re Territo*, 156 F.2d 142, 143-45 (9th Cir. 1946) (upholding petitioner's detention only after district court held a hearing and found facts establishing Territo's prisoner-of-war status); *United States ex rel. Zdunic v. Uhl*, 137 F.2d 858, 859-60 (2d Cir. 1943) (reviewing whether relator was a "native, citizen, denizen, or subject" of Germany, and thus subject to detention as an "alien enemy"); *Ex parte Toscano*, 208 F. 938, 943-44 (S.D. Cal. 1913) (allowing petitioners' temporary detention as foreign belligerents only upon determining that, on the stipulated facts, international law essentially required it); *see also Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778) (reviewing impressment of sailor into British Navy despite King's claim that ships were "short of men").

offenses against the law of war had recognized the right of the accused to make a defense."). Consequently, the only question before the *Quirin* Court was whether "the detention of petitioners . . . *for trial* by Military Commission . . . on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States." 317 U.S. at 18-19 (emphasis added); *id.* at 46 ("We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission."). Padilla, on the other hand, is being held by military officials without charges or trial.[16]

In passing on the legality of trying combatants for a particular violation of the law of war, the *Quirin* Court observed that "[l]awful combatants are subject to capture and detention *as prisoners of war*." *Id.* at 31 (emphasis added). Unlawful combatants, the Court continued, in addition to such capture and detention in accordance with international law, can be "subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Id.* Resting virtually its entire case for Padilla's detention on these two sentences, the government argues that the power to try the *Quirin* petitioners by military commission necessarily implies the authority to detain Padilla indefinitely even without charges or trial. Putting aside the government's failure to comply with international legal requirements governing the detention of combatants,[17] Petitioner's

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[16] As an American citizen, Padilla is expressly ineligible for trial by military commission under the President's Order establishing the commissions. Presidential Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001); *see also* 32 C.F.R. § 9.1 *et seq.* (establishing procedures for "Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism").

[17] The United States is a signatory to the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T.

argument collapses if Padilla is not a combatant in the first instance. *See supra* at 16. More fundamentally, it is simply not the case that the power to detain someone without process is a less severe intrusion on liberty than the power to punish someone after process has been afforded. Otherwise, a criminal trial would be unnecessary whenever an individual stands accused of an offense.

All of these differences between Padilla and the *Quirin* petitioners have important constitutional ramifications. Since the Magna Carta, due process has been understood to mean that "[n]o free man shall be taken or imprisoned . . . or in any way destroyed . . . except by the legal judgment of his peers or by the law of the land." Magna Carta art. 39 (1215), *reprinted in Sources of our Liberties* 17 (Richard L. Perry ed., 1959). The government treats as an inconvenience safeguards that the Framers regarded as essential, including the right to indictment and trial by jury. *See generally Chambers v. Florida*, 309 U.S. 227, 236-37 (1940).

Contrary to Petitioner's expansive reading of *Quirin*, the opinion carefully reflects the limitations articulated by Justice Black in a memorandum to Chief Justice Stone:

> In this case I want to go no further than to declare that these particular defendants are subject to the jurisdiction of a military tribunal because of the circumstances and purposes of their entry into this country as part of the enemy's war forces. Such a limitation, it seems to me, would leave the *Milligan* doctrine untouched, but to subject every person in the United States to trial by military tribunals for every violation of every rule of war which has been or may hereafter be adopted . . . might go far to destroy the protections declared by the *Milligan* case.

Danelski, *supra*, at 76 (citation omitted). As Chief Justice Stone explained for the majority: "We hold only that *those particular acts* constitute an offense against the law of war which the Constitution authorizes to be tried by military commission." 317 U.S. at 46 (emphasis added).

Quirin thus carved out a limited sphere in which the military was allowed to try admitted combatants for specific, stipulated violations of the law of war. To use *Quirin* to justify the detention in this case would in effect rewrite that decision. It would also fatally undermine *Milligan*, a precedent that has for nearly 150 years stood as a bulwark between our constitutional democracy and the nation we would be if the Executive were indeed vested with the unchecked power it seeks here.

C. *Milligan's* Holding Has Been Frequently Reaffirmed Since *Quirin*

By minimizing the significance of *Milligan* and misinterpreting the relevance of *Quirin*, Petitioner has misplaced both decisions in our constitutional history. *Quirin* is easily confined to its facts, and its holding has never been extended by this Court. *Milligan*, by contrast, is rooted in principles that predate our nation's founding and that have continued to flourish. Indeed, fifteen years after it decided *Quirin*, the Court characterized *Milligan* as "one of the great landmarks in this Court's history." *Reid v. Covert*, 354 U.S. 1, 30 (1957).

3316, 3322, 75 U.N.T.S. 135, 140 (1956). If Padilla is not a civilian, he must be treated in accordance with the provisions of the Convention. Article 5 of that Convention requires that lawful combatants be treated as prisoners of war. If there is any doubt as to whether a combatant is lawful or unlawful, the individual is to be afforded the protections of the Convention until his or her status is determined by a competent tribunal. *Id.* art. 5.

Consistent with the Framer's strong opposition to military usurpation of civilian rule, the Court in modern times has repeatedly confined military jurisdiction within narrow limits. Thus, in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the Court rejected the government's claim that the Hawaiian Organic Act, which allowed suspension of the writ of habeas corpus and imposition of martial law, gave "the armed forces power to supplant all civilian laws and to substitute military for judicial trials. . . ." *Id.* at 313. As a consequence, the Court ordered the release of the two petitioners, who had been tried by military tribunals in Hawaii following the attack on Pearl Harbor.[18] The act at issue had been "intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island," *id.* at 324, but its language and legislative history did not clearly address whether the military could substitute its own jurisdiction for that of the courts. *Id.* at 315-19. The Court, however, found the "answer . . . in the birth, development and growth of our governmental institutions." *Id.* at 319. Given the principles and historic practices of the nation, the Court ruled that the Act could not be interpreted as allowing the military to subjugate civilian authority and bypass the courts.

Sharp limitations on military authority continued in *Toth v. Quarles*, 350 U.S. 11 (1955), where the Court held that Congress cannot subject an ex-soldier to military jurisdiction, even for an offense committed while in service. The Court observed:

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[18] At the time of one petitioner's prosecution, the courts were barred from conducting criminal trials by order of the military. 327 U.S. at 308-09. In the case of Duncan, the courts had been allowed to return to their normal functions, but he was nonetheless tried before a military tribunal for having violated a military order "which prohibited assault on military or naval personnel with intent to resist or hinder them in the discharge of their duty." *Id.* at 310-11.

> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.

Id. at 22.

The Court in *Reid v. Covert* again declined to depart from the constitutionally enshrined tradition that military power be subservient to civilian authority. 354 U.S. at 40. Building on *Milligan*, *Duncan*, and *Toth*, the Court held that, even in the case of service members' dependents living on military bases, Congress lacked power under the Constitution to subject civilians to military trial. The Court emphasized that civilian courts, operating in accordance with Article III and the Fifth, Sixth, and Eighth Amendments, are "the normal repositories of power to try persons charged with crimes," whereas "the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction." *Id.* at 21; *see also Toth*, 350 U.S. at 15-17, 22-23 & n.23 (linking the importance of preventing military encroachment to the preservation of the right to trial by jury and related constitutional protections). Recognizing that "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections," *Reid*, 354 U.S. at 21, the Court held fast to the nation's "deeply rooted and ancient opposition in this country to the extension of military control over civilians." *Id.* at 33

This long history of carefully repelling military encroachment upon the supremacy of civilian authority and the rule of law makes clear that neither the President nor

Congress can impose the detention to which Padilla has been subject. If civilians cannot be subject to military trial, they surely cannot be subject to military detention without trial. The Executive nonetheless claims that its decision to hold Padilla in military custody without charges or trial should be upheld because terrorism presents a threat unlike any other our nation has previously encountered. What is lacking in precedent, it suggests, is made up for by exigency, in essence echoing its decades-past argument that the rule of *Milligan* was "distinctly unsuited to modern warfare conditions where all of the territories of a warring nation may be in combat zones or imminently threatened with long-range attack even while civil courts are operating." *Duncan*, 327 U.S. at 329 (Murphy, J., concurring).

To this, Justice Murphy responded:

> The argument thus advanced is as untenable today as it was when cast in the language of the Plantagenets, the Tudors and the Stuarts. It is a rank appeal to abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war. It seeks to justify military usurpation of civilian authority to punish crime without regard to the potency of the Bill of Rights. It deserves repudiation.
>
> . . .
>
> From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised.

Id. at 329-30; *see Reid*, 354 U.S. at 14 ("The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government."); *Milligan*, 71 U.S. at 120-21.

D. The Executive's Use of the Term "War" Does Not Resolve the Constitutionality of Padilla's Detention

This case raises fundamental questions concerning the meaning of "war" in an age of terrorism and the scope of the President's power to combat what no one denies is a very real threat to the United States and the security of its people. The security of our people, however, depends not only on defending our borders but also on defending the constitutional principles that define us as a nation.

Not even the government contends that the current struggle against terrorism fits within the definition of a traditional war. Yet, it selectively seeks to invoke the rules of traditional warfare to justify its actions in this case. Even under that framework, the government has overstepped its bounds, as demonstrated above. There are, however, important differences between the "war" on terrorism and a traditional war that must be carefully considered in determining the appropriate constitutional rules to apply to these facts.

Ignoring those differences, the government argues that the detention of "enemy combatants" is always indefinite because one can never be sure when a war will be over. That statement is correct, but misleading. While we could not have predicted in 1942 that World War II would end three years later, we could anticipate that the war would be concluded by either a surrender or a negotiated settlement

and that both sides' prisoners of war would be repatriated at the war's end.

Even putting aside the critical fact that Padilla is not being treated as a prisoner of war, it is hard to imagine that the threat posed by global terrorism will ever be resolved by a negotiated resolution. Indeed, the government itself has candidly acknowledged as much. *See* Brief for Respondent at 16, *Hamdi v. Rumsfeld*, *cert. granted*, 124 S. Ct. 981 (2004) (No. 03-6696). As a result, there are simply *no* rules constraining the government's claimed power. It alone gets to decide who is an "enemy combatant." It alone gets to decide when, if ever, the "war" on terrorism is over. And, assuming the "war" is still ongoing, it alone gets to decide whether individuals detained without due process can safely be released. Under Petitioner's view, Congress has no role to play in the process, and the role of the courts is marginal at best.

In a system of divided government, this is an extraordinary and unprecedented assertion of executive power. Predictably, it has already led to seemingly arbitrary results. The government has never explained why Zaccarias Moussaoui is being criminally prosecuted, Jose Padilla is not, and Ali Saleh Kahlah al-Marri was initially prosecuted criminally and then abruptly transferred to military jurisdiction, although all three are alleged to have been "associated" with Al Qaeda. Similarly, the government has never explained why John Walker Lindh was criminally prosecuted and Yaser Hamdi was not, although both are alleged to have fought with the Taliban.

Our system of checks and balances was designed to ensure that individual liberty does not rest on the good faith of government officials, and to place limits on the exercise of government authority. By contrast, the assertion of power by the Executive in this case is virtually boundless. Padilla was arrested at O'Hare by law enforcement agents. He has now

been detained by the military for twenty-two months on the theory that he is an enemy soldier captured on the battlefield. Fundamental rights can and should depend on more than the manipulation of labels.

Both before and after September 11th, the government has indicted and convicted numerous alleged terrorists in the criminal justice system. Its contention that it will lose the opportunity to interrogate Padilla for intelligence purposes if he is indicted does not distinguish Padilla's situation from any of those other cases. Nor, for that matter, does it distinguish Padilla from other cases where a criminal defendant may possess important intelligence information, such as espionage prosecutions.

This case does not involve the deployment of American forces overseas. It does not involve someone captured abroad while engaged in direct hostilities against our military forces. It does not involve someone whose activities could be privileged under the law of war if performed in uniform. It does not involve someone who is beyond the reach of the American criminal justice system.

If the government believes that Padilla was plotting to engage in terrorist acts, the criminal courts remain open and functioning and perfectly capable of adjudicating his guilt. Under *Milligan*, that is where his case belongs. That is all this Court is being asked to decide.

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

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In The
Supreme Court of the United States

DONALD H. RUMSFELD, Secretary of Defense,

Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN,
as next Friend of Jose Padilla

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICI CURIAE LEGAL AND RELIGIOUS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

Amici curiae are legal and religious organizations committed to preservation of the rule of law and constitutionally protected freedoms. *Amici* address the central question presented in this case, namely whether the President may seize an American citizen in the United States and detain him indefinitely as an "enemy combatant."[2]

The Beverly Hills Bar Association has 3,300 members. For more than seventy years the Association has dedicated itself to the advancement of the rule of law, civil rights, equal access to the courts, and judicial independence. The Association seeks to appear as an *amicus* because this case presents crucial issues regarding each of the Association's historical concerns: Whether any branch of our federal government is unaccountable and above the rule of law? Whether civil rights and liberties belong only to those selected by executive fiat? And whether access to the courts and judicial review of executive actions can be unilaterally curtailed because of an undeclared "war on terrorism"?

The National Council of the Churches of Christ in the USA, founded in 1950, is the leading force for ecumenical cooperation in the United States. The NCC's 36 Protestant, Anglican and Orthodox denominations include more than 50 million persons in 140,000 local congregations in communities across the nation. The NCC is interested from a moral standpoint in the constitutional guarantees to due process afforded US citizens, which are at stake in this case.

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[1] Letters of consent to the filing of this brief have been lodged with the Court. No counsel for a party in this case has authored this brief in whole or in part and no person other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* do not address the other question presented, "Whether the district court has jurisdiction over the proper respondent to the amended habeas petition."

The Shalom Center is a nationwide transdenominational network of Jews and others who draw deeply on Jewish tradition to seek peace, pursue justice, heal the earth and build community. Among its concerns is the traditional Jewish teaching that all human societies, the "children of Noah," are bound by Divine command to make courts of law available to everyone.

The Southern Poverty Law Center, founded in 1971, is a nationally recognized leader in the area of civil rights litigation. The Center has litigated numerous pioneering civil rights cases on behalf of women, minorities, prisoners challenging their conditions of confinement, and many other victims of injustice. The Center has won six landmark civil rights lawsuits before this Court.

The Union for Reform Judaism (URJ), the congregational arm of the Reform Jewish Movement, encompasses 1.5 million Reform Jews in 900 congregations nationwide. The American Jewish community long has cherished the freedoms guaranteed by the Constitution. As we strive in this age of terrorism to determine the appropriate balance between our constitutionally protected freedoms and national security, we turn to Jewish values for guidance, which affirm the spark of the divine in every individual and mandate the just treatment of all. Guided by the highest ideals of the American legal system and inspired by our religious heritage, the URJ opposes indefinite detentions without charges or evidence, and administrative rulings that deny citizens the full scope of constitutionally-guaranteed due process rights.

ARGUMENT

Our national history has been marked by recurrent crises in which civil liberty is violated for the sake of perceived national security, only to be followed by restoration of liberty and repentance for the violations. We are now in such a crisis. Whether, this time, we will preserve liberty is largely in the hands of this Court.

Our historical pattern – overreaction, followed by restoration and repentance – has been detailed by the

Chief Justice,[3] and is summarized in the *amicus* brief of Fred Korematsu in the Guantanamo and *Hamdi* cases now before this Court.[4] The pattern began with the Alien and Sedition Acts of 1798 and continued through the Civil War, World Wars I and II and the Cold War. There is no need to repeat its full contours here.

Instead we focus on three episodes involving military detentions in wartime. In each the courts participated in the repression, the repentance, or both.

The first is a precedent worthy of emulation: this Court's correction of wartime military excess in *Ex Parte Milligan*, 4 Wall (71 U.S.) 2 (1866). All members of this Court – the majority on constitutional grounds and the dissent on statutory grounds – rejected the military detention and trial of Lamdin Milligan, even though he was formally accused of offenses comparable to those of which Jose Padilla is informally accused.

Not only did the Court unanimously reject Milligan's military trial, it also unanimously rejected the government's fallback claim – which has now become its principal claim in *Padilla* – of authority to detain him indefinitely, until the war is over.

Understandably the government's brief all but ignores *Milligan*. Instead it relies heavily on a second episode: this Court's upholding of a wartime military trial in *Ex Parte Quirin*, 317 U.S. 1 (1942). But *Quirin* did not address the issue presented here – the executive claim of military authority to hold an American citizen indefinitely without trial. It considered only the separate issue of detention for trial by military commission, an issue not presented here.

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[3] William H. Rehnquist, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998) (hereafter "Rehnquist") (page citations herein from First Vintage Books ed. 2000).

[4] Brief of Amicus Curiae Fred Korematsu in Support of Petitioners, filed in *Odah v. US*, *Rasul v. Bush*, and *Hamdi v. Rumsfeld*, Nos. 03-343, 03-334 and 03-6696 this term.

Moreover, the *Quirin* facts, unlike *Milligan* and *Padilla*, involved "combatants" subject to detention for the duration of the war.

Quirin should not now be extended beyond its facts and the narrow question it decided. As Justice Frankfurter later regretted, it was "not a happy precedent."[5] Under pressure of war and potential presidential defiance, the Court ruled precipitously, without being fully advised. By the time the Court issued its opinion, six petitioners were already executed. It was too late for second thoughts.

The pressures of the times, the tendency of the executive to withhold material information, and this Court's vulnerability to both, were further exemplified by the third episode: convictions of Japanese Americans for violating military curfew and internment orders, upheld in *Hirabayashi v. U.S.*, 320 U.S. 81 (1943) and *Korematsu v. US*, 323 U.S. 214 (1944), but later regretted and vacated.

Like *Quirin*, *Hirabayashi* and *Korematsu* illustrate the temptation for the executive to exaggerate the military necessity of wartime restrictions on liberty. They stand as monuments to the imprudence of entrusting liberty in time of crisis to the executive and military.

Taken together, all three episodes teach that to preserve liberty, any departures from ordinary constitutional safeguards require both judicial scrutiny and congressional mandates. Yet the government now asks the Court to permit indefinite military detention of an American citizen seized off the battlefield, with minimal judicial review and no congressional authorization.

That is reason enough to reject its request. But there is more. Whereas in *Milligan* Congress imposed limits on

[5] "Memorandum Re: Rosenberg v. United States, Nos. 111 and 687, October Term 1952," June 4, 1953, at 8; Frankfurter Papers, Part I, Reel 70, quoted in Louis Fisher, *CRS Report for Congress, Military Tribunals: The Quirin Precedent*, March 26, 2002, (hereafter "Fisher") at CRS-39 and n. 188.

detentions of citizens, it now broadly prohibits them: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). As the court below correctly ruled,[6] this prohibits the military detention of Mr. Padilla, and nothing in the congressional authorization of the use of force purports to allow an exception.

The lessons of history, then, confirm the wisdom of the ruling below that the President has no inherent constitutional authority to detain Jose Padilla indefinitely in military custody.

I. *Ex Parte Milligan*: The Most Applicable Precedent

Decided in 1866, *Ex Parte Milligan*, 4 Wall (71 U.S.) 2, was a judicial correction of wartime military excess. While one may question some of its rhetoric as well as the majority's decision to reach constitutional issues,[7] the core of the judgment stands as one of the "bulwarks of American liberty."[8] All nine Justices – both the majority and the dissent – ruled that the military had no jurisdiction to detain or prosecute a civilian citizen of Indiana for attempting to aid the enemy in the Civil War, and ordered his release from military custody. *Id.* at 106.

The parallels between the cases of Lamdin Milligan and Jose Padilla are striking. Like Padilla, Milligan was accused of being what the government today might (erroneously) call an "unlawful enemy combatant." Then, as now, the government invoked the President's authority as Commander in Chief in an unsuccessful effort to bypass constitutionally ordained judicial procedures and to avoid

[6] *Padilla v. Rumsfeld*, 352 F.3d 695, 718-24 (2d Circ. 2003), *cert. granted sub nom. Rumsfeld v. Padilla*, 2004 U.S. LEXIS 1011 (U.S., Feb. 20, 2004).

[7] See Rehnquist at 134-37, 221.

[8] Charles Warren, THE SUPREME COURT IN UNITED STATES HISTORY, 2d ed., vol. 2, Boston: Little Brown, at 427-28, quoted in Rehnquist at 132.

an express congressional prohibition. Then, as now, the government cited the dangers posed by secretive enemies, as well as the laws of war and supposed lack of judicial competence, to justify military detention and trial of a civilian accused of serious crimes.

While the majority relied on constitutional and the dissent on statutory grounds, none recognized any inherent executive authority, certainly not in the face of an express congressional prohibition, for the military to prosecute or detain indefinitely an American citizen where civil courts are open and unobstructed.

A. The Charges In *Milligan*: Comparable to *Padilla*

Milligan was formally accused of offenses that were serious in both a criminal and a military sense – comparable in nature and gravity to those of which Jose Padilla is informally accused.[9] At a time when the Civil War raged, Milligan allegedly joined a secret society known as the Order of American Knights, or Sons of Liberty. *Id.* at 6. This was allegedly "a powerful secret association, composed of citizens and others, [which] existed within the state, under military organization . . ." *Id.* at 140. They were accused of "conspiring against the draft, and plotting insurrection, the liberation of prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government," *id.*, and of "holding communication with the enemy." *Id.* at 6. At the time, argued the government, the Sons of Liberty claimed 100,000 members in Indiana and neighboring states,[10] jeopardizing the security

[9] One may question the evidentiary foundation for these charges. Rehnquist at 104. However, neither the majority nor the dissenters did so; rather, taking them as true, all nine Justices nonetheless concurred in ordering Milligan's discharge from military custody.

[10] Various claims as to the numerical strength were made in testimony at the military trial. Rehnquist at 90-91, 97.

of confinement of ten thousand rebel prisoners of war in the vicinity. *Id.* at 87, 102.

Milligan was arrested in Indiana in October 1864 by order of the military commandant. At the time, Indiana enjoyed peace but not tranquility. It was then a "theatre of military operations, had been actually invaded, and was constantly threatened with invasion." *Id.* at 140.

Milligan was confined for 16 days and then tried before a military commission, which found him guilty of conspiracy against the government, affording aid and comfort to rebels, inciting insurrection, disloyal practices, and violations of the laws of war. The commission sentenced him to death. *Id.* at 7. Before his case came before this Court, President Johnson commuted his sentence to life in prison.[11]

Unlike Milligan, Padilla allegedly traveled abroad for training and collaboration with terrorists. This, however, makes no difference. Milligan, too, allegedly joined a secret organization in communication and cooperation with armed adversaries, plotting violent action against the United States. Nothing in the government's argument suggests that it would view Padilla any differently, if his communications with the enemy had been by long distance, like Milligan's, rather than by traveling to Afghanistan.

B. The Military Commission's Lack of Jurisdiction

1. The Government's Arguments: Parallels With *Padilla*

Milligan's habeas petition asked for release from military custody on the ground that the military had no jurisdiction to try him. Because civil courts in Indiana were open and functioning, he argued, his military trial violated the Constitution and exceeded executive authority, at least

[11] Rehnquist at 104.

in the absence of congressional authorization. *Id.* at 22, 28-40, 42-84.[12]

The government contended that in authorizing military detention and trial of disloyal citizens, President Lincoln acted within his powers as Commander in Chief. In September 1862 Lincoln had suspended habeas corpus, and authorized military detention and trial of persons "guilty of any disloyal practice, affording aid and comfort to rebels, . . ." *Id.* at 15-16. Without conceding that congressional legislation was "needed" to sustain this proclamation, the government argued that the subsequent statute of March 1863, authorizing suspension of habeas corpus, ratified Lincoln's proclamation. *Id.* at 16.

Then, as now, the government argued that the power to detain and try citizens who collaborate with adversaries is inherent in the constitutional powers of the Commander in Chief:

> The commander-in-chief has full power to make an effectual use of his forces. He must, therefore, have power to arrest and punish one who arms men to join the enemy in the field against him; one who holds correspondence with that enemy; one who is an officer of an armed force organized to oppose him; one who is preparing to seize arsenals and release prisoners of war. . . . *Id.* at 17.

Then, as now, the government argued that these inherent powers were not confined to the battlefield, especially in view of the special nature of the war. When Milligan argued that he had not been a resident of a rebel state, the government replied that "neither residence nor propinquity to the field of actual hostilities" is the test of military jurisdiction, "even in a time of foreign war, and certainly not in a time of civil insurrection." *Id.*

[12] The parties also debated whether the federal courts had jurisdiction. This Court ruled that they did. 71 U.S. at 117-18. This issue is not presented in *Padilla* and is not addressed here.

The government also contended that Indiana was at the time of Milligan's arrest a "theatre of military operations." Not only was it a "geographical military department, duly established by the commander-in-chief," it "had been and was then threatened with invasion, . . ." *Id.* at 17.

The government further argued that civil courts could not intervene. Once war begins, it argued, the Commander in Chief "is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration." *Id.* at 18. Civil courts were not competent to deal with the threat, in part because the Sons of Liberty – like Al Qaeda today – was a secret organization. Courts could not know how extensive it was, because

> It was a secret order. . . . But the Executive . . . did know, that this Order professed to have one hundred thousand men . . . , so that no jury could be found . . . , and that any courthouse . . . , would have been destroyed. The President has judged that in this exigency only a military tribunal could safely act. *Id.* at 102.

Thus, in *Milligan* as in *Padilla*, the government argued (1) that the Commander in Chief's power to conduct war necessarily implies the power to detain and punish citizens for alleged collaboration with the enemy, (2) that this power extends even outside the "field of actual hostilities," (3) that even a State with no actual hostilities was within the "theatre of military operations," (4) that this was due in part to the special nature of the conflict (civil insurrection then, international terrorism now), (5) that the President alone could judge military necessity, (6) that civil courts were not competent to act, in part because of the secretive character of the enemy, and (7) that the military therefore had jurisdiction over a citizen accused of collaborating with the enemy.

Even in the context of one of the greatest threats our republic has ever faced, this Court rejected these arguments. It should no more accept them now.

2. The Majority: The Constitution shields citizens from military jurisdiction

No member of this Court accepted the assertion of presidential authority as Commander in Chief to subject Milligan to military jurisdiction. On the contrary, both the majority (on constitutional grounds) and dissent (on statutory grounds) rejected military jurisdiction.

The majority rightly viewed the issue as one of epic proportion:

> No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. . . . By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. 71 U.S. at 118-19.

The risk to civil liberty in troubled times had been anticipated by the framers, who:

> . . . foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. *Id.* at 120.

So they wrote a law to cover all cases: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Id.* at 120-21.

The Constitution conferred the judicial power on the judiciary, not the military. The "laws and usages of war" could not take that power away, because "they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." *Id.* at 121.

In addition, the constitutional right of trial by jury was violated by a military trial. *Id.* at 122-23. It could not be that "when war exists, foreign or domestic, . . . a commander . . . can, if he chooses, . . . on the plea of necessity, . . . substitute military force for and to the exclusion of the laws, . . ." *Id.* at 124.

If that were true, "there is an end of liberty regulated by law. Martial law, . . . on such a basis, destroys every guarantee of the Constitution, . . . Civil liberty and that kind of martial law cannot endure together; . . ." *Id.*

Indiana was not a "theatre of military operations." If "once invaded, the invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration." *Id.* at 126-27.

Secret conspiracies like those with which Milligan (and now Padilla) was allegedly involved – "armed to oppose the laws, and [which seek] by stealthy means to introduce the enemies of the country into peaceful communities" – were indeed "extremely perilous." But the constitutional answer is not military trial. It is instead for civil courts to impose "the heaviest penalties of the law, . . ." *Id.* at 130.

If Indiana in 1864 did not meet the constitutional test – permitting military jurisdiction over civilians only where civil courts are closed and cannot function – neither does South Carolina, where Padilla has been in military detention for nearly two years.

3. The Dissent: Only Congress can authorize military jurisdiction over citizens

The four dissenters likewise lent no support to the claim of inherent executive power to subject an American citizen to military jurisdiction. And they expressly rejected military jurisdiction beyond the limits set by Congress.

Concurring that habeas should be granted and Milligan discharged from military custody, the dissenters

"assent[ed] fully" to the majority view "of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty." *Id.* at 132-37.

They dissented on only two points. First, congressional suspension of habeas "authorized" the executive to arrest and detain – within limits. Second, once Congress suspends habeas, Congress may authorize military arrest, detention and trial of citizen collaborators, even "in states where civil courts are open." *Id.* at 137.

Neither point supports the government's claims in *Padilla*. Both apply only when Congress authorizes suspension of habeas, which it has not done here.

The dissent was equally unhelpful to the government in *Milligan*. In authorizing suspension of habeas, Congress had imposed limitations. *Id.* at 133. Except for prisoners of war,[13] it required the executive to inform federal courts of all Union state citizens held prisoner under presidential authority and to release them if the grand jury adjourned without proceeding against them. *Id.* at 133-34. Since the grand jury adjourned without indicting Milligan, *id.* at 131, his continued military detention violated the statute. *Id.* at 134.

C. The Military Could Not Detain Milligan Indefinitely

The government had a fallback argument in *Milligan*, which has now become its lead argument in *Padilla*: Even if the military tribunal had no jurisdiction, Milligan could nonetheless be "held, under the authority of the United States, until the war terminates, . . ." *Id.* at 21.

Neither the majority nor the dissent accepted this claim. The majority answered:

[13] The Court rejected the government's contention that Milligan was a prisoner of war. 71 U.S. at 21, 131. The government does not contend that Padilla is a prisoner of war.

> If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. *Id.* at 131.

The government likewise alleges that Padilla's actions were not "legal acts of hostility" or protected by the "rights of war." Hence *Milligan* equally negates the government's claim to detain Padilla indefinitely.

The claim fails as well under the rationale of the *Milligan* dissent. Whereas in *Milligan* Congress merely limited military detentions, it now broadly prohibits them: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. 4001(a). This bars the military from arresting a citizen off the battlefield and detaining him in the United States where civil courts are functioning.[14] The Congressional authorization for use of force following 9/11 said nothing about detaining citizens,[15] and *Milligan* contradicts any claim that the power to detain citizens off the battlefield is inherent in the Commander in Chief's use of force.

The *Milligan* dissent, then, teaches that the military has only such power to detain citizens off the battlefield as Congress chooses to authorize. Here Congress has not only failed to authorize, but affirmatively prohibited such detentions.

D. The Message of *Milligan*

The government claims that the military may detain Jose Padilla indefinitely, until the "war" on terrorism is

[14] See analysis by the Court of Appeals in this case, 352 F.3d at 718-22.

[15] *Id.* at 722-24.

over. In rejecting the same claim in *Milligan*, this Court answered:

> If it was dangerous, . . . , to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to the rebels, and incited the people to insurrection," the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury . . . and if indicted, try him according to . . . the common law. 71 U.S. at 122.

"If this had been done," concluded the Court, "the Constitution would have been vindicated, the law . . . enforced, and . . . personal liberty preserved . . ." *Id.* So too here. Jose Padilla should be discharged from military custody and, if dangerous, returned to civil courts.

II. *Ex Parte Quirin:* "Not A Happy Precedent"

The government's brief all but ignores *Milligan*. Instead it relies heavily on *Ex Parte Quirin*, 317 U.S. 1 (1942), where the Court upheld President Roosevelt's authority to try by military commission eight German saboteurs, including one arguable American citizen. In the government's view, "*Quirin* settles that the Constitution raises no absolute prohibition against the detention of an American citizen as an enemy combatant in the circumstances of this case." Pet. Br. 34.

But *Quirin* did not address the issue presented here (and in *Milligan*) – the executive claim of military authority to hold an American citizen indefinitely without trial. The *Quirin* Court made clear, "The question for decision is whether the detention . . . for trial by Military Commission" was lawful and constitutional. 317 U.S. at 18-19.

Even on the issue it did decide – the "jurisdiction of military tribunals" – *Quirin* expressly limited its holding to the facts of that case. *Id.* at 45-46.

Unlike *Milligan* – a judicial correction of wartime military excess – *Quirin* was part of a wartime excess. The Court ruled precipitously, under pressure of the most

difficult year of the war and a presidential threat to defy a contrary ruling. It heard argument the day briefs were filed and announced its decision one day after argument. It did not issue an opinion until three months later – after six defendants were already executed.

This placing of the decisional cart before the jurisprudential horse was later regretted by Justice Frankfurter as "not a happy precedent."[16] Justice Douglas lamented the practice as "extremely undesirable . . . Because once the search for the grounds, the examination of the grounds that had been advanced is made, sometimes those grounds crumble."[17]

Quirin thus illustrates *Milligan's* admonition that constitutional liberty is most at risk when "society is disturbed by civil commotion – if the passions of men are aroused and the restraints of law weakened . . . " 71 U.S. at 123-24. While there is no occasion to revisit *Quirin* here, because it dealt with a separate issue (detention for trial by military commission), it should not now be extended beyond its facts and the narrow legal issue it decided.

A. A Materially Different Question

The issue in *Padilla* is the same as the second issue in *Milligan*: namely, whether the military is authorized to detain an American citizen indefinitely, until the war is over. *Quirin*, in contrast, revisited the first issue in *Milligan*: whether the military may detain a citizen for trial and then try him. *Padilla* is thus governed by *Milligan*, not *Quirin*.

Quirin made clear what it decided. With respect to detention, the July 31, 1942 per curiam order held "[t]hat petitioners are held in lawful custody for trial before the

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[16] Note 5 *supra*.

[17] Conversation between Justice William O. Douglas and Professor Walter F. Murphy, June 6, 1962, at 204-05, Seeley G. Mudd Transcript Library, Princeton University, quoted in Fisher at CRS-39 and n. 189.

military commission, . . ." 317 U.S. at 48. Three months later the Court's opinion, issued October 29, 1942, reiterated, "The question for decision is whether the detention of petitioners . . . for trial by Military Commission" was lawful and constitutional. *Id.* at 18-19.

The Court's answer was even narrower. It had "no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals. . . ." It was "enough that petitioners here, upon the conceded facts, were plainly within those boundaries, . . ." In particular, they

> were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in our territory without uniform – an offense against the law of war.

The Court then expressly limited its holding to those facts: "We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission." *Id.* at 45-46.

Padilla does not fit within the *Quirin* holding. The military detention of Padilla has two purposes: to prevent him "from rejoining the enemy and continuing the fight," and "to gather critical intelligence." Pet. Br. 28-29. The government does not claim to hold him, as in *Quirin*, "in good faith for trial by military commission."

The distinction is both constitutionally and practically significant. It matters constitutionally because the precedent on indefinite detention without trial is *Milligan*, not *Quirin*. *Milligan* rightly rejected the claim that the military could hold a citizen collaborator without trial "until the war terminates."

The distinction matters practically as well. Indefinite detention until the "war" on terrorism ends, without trial, could mean imprisonment for years, even for life. Whatever the shortcomings of a military trial – and in *Quirin* they were many – the accused has at least some opportunity to be heard in an adversarial setting. In contrast,

under the government theory rejected in *Milligan* and renewed here, Padilla would have no such right.[18]

B. Materially Different Facts

The alleged factual situation of Padilla, says the government, "fits squarely within" the Court's language in *Quirin*. Pet. Br. at 31.

The government overlooks material differences. First, the facts in *Quirin* were largely stipulated and, except as otherwise noted, "undisputed." 317 U.S. at 20. The only charge the Court ruled triable by military commission was predicated on "admitted facts." *Id.* at 36. The Court's holding rested upon "conceded facts." *Id.* at 46.

This matters, because the facts in *Quirin* were jurisdictional: on those facts, and "only" on those facts (*id.*), the Court found military trial permissible. In contrast, Padilla has stipulated to nothing. Nor could he do so, because he has had no opportunity to be heard. Yet the government claims the right to detain him indefinitely, while denying him any right to challenge the "facts" on which its claim of right is based.

Second, even the government's version of the *Padilla* facts differs materially from those in *Quirin*. Unlike Padilla, the *Quirin* prisoners fit the traditional concept of combatants in the law of war. All were born in Germany. Six had remained citizens of that enemy nation with which the United States was in a declared war. A seventh forfeited his U.S. citizenship by joining the German army.[19] The citizenship of the eighth was in dispute before this Court. All were paid agents of the German military. They were transported to the United States by German military submarines, discarded their German military uniforms

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[18] Recently the government permitted Padilla to meet with counsel, but only as a matter of policy, not of right. Pet. Br. 12 n.5.

[19] Fisher at 19, 24.

only after landing on our beaches, and entered our country carrying explosives. *Id.* at 21-22. They came to our country, not to commit crimes, but instead with instructions from a German military officer "to destroy war industries and war facilities in the United States" and "with the purpose of destroying war materials and utilities." *Id.* at 21, 46.

These facts mattered to the narrow holding in *Quirin*. They took the case out of the category of crimes for which the right of trial by jury is protected by the Constitution. The purpose of the constitutional right was "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future." *Id.* at 39. But the undisputed *Quirin* facts fit clearly within traditional understandings of "offenses against the law of war not triable by jury at common law." *Id.* at 40. Hence they could be tried by military commission. *Id.* at 42, 45.

The *Padilla* facts differ. There is no claim that he acted on behalf of any foreign government or in any "war" that would have been defined as such at the time of the Constitution. There is no claim that he came to the United States by military transport, wore a military uniform en route, carried military arms or explosives into this country, or had the purpose to attack military targets.

Rather, the government's claim is in essence that he came here on behalf of a terrorist organization to look for potential sites for terrorist bombings. He was not looking for specifically military targets. On the contrary, he is alleged to have associated with Al Qaeda, a group known to attack civilians.

If the government's allegations are true, then, Padilla committed crimes of a nature traditionally prosecuted in civil courts, e.g., *U.S. v. Timothy McVeigh*, 153 F.3d 1166 (10th Cir. 1998), *cert. denied*, 526 U.S. 1007 (1999); *U.S. v. Yousef*, 327 F.3d 56 (2d Cir.), *cert. denied sub nom. Yousef v. U.S.*, 124 S.Ct. 353 (2003), and for which the Constitution accordingly guarantees the right of trial by jury and to due process of law. Under the rationale of *Quirin*,

Padilla should be tried in civil court, not detained indefinitely by the military.

C. Padilla Is Not A "Combatant" Under *Quirin*

The government relies on *Quirin* to distinguish lawful and unlawful combatants, as follows:

> The law of war draws a distinction . . . between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. 317 U.S. at 31-32 (footnotes omitted).

But there is also a distinction between combatants – whether lawful or unlawful – and criminals. Unlike the defendants in *Quirin* – but like Milligan – Padilla was never a "combatant" in the first place.

Under the law of war a combatant is privileged to engage in combat, without being prosecuted for doing so, so long as he does not commit a war crime, such as murdering a civilian or, as in *Quirin*, going behind enemy lines without uniform as a saboteur. As stated in the 1977 Geneva Protocol I, combatants are persons who "have the right to participate directly in hostilities."[20] They cannot be prosecuted for mere membership in an army, nor merely for engaging in armed hostilities against an opposing force. They can be prosecuted only for particular *acts*

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[20] Protocol I defines "combatants" as members of the armed forces of a party to a conflict, who "are combatants, that is to say, they have the right to participate directly in hostilities." *Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977, entered into force, Dec. 7, 1979, art. 43.2. Art. 44.1 specifies that "combatant" is "defined in Article 43."

which amount to war crimes. Committing such acts makes one an "unlawful combatant."

Padilla was not an "unlawful" combatant because he was not a combatant. His legal position contrasts with that of the *Quirin* defendants:

Quirin Defendants. Until they arrived in the United States, the *Quirin* defendants committed no legal wrong under the laws of war.[21] They were entitled to join the German military, and even to train to attack military installations in this country. Upon reaching our shores, even if they had actually blown up a munitions factory, they still would have been protected from prosecution, so long as they remained in uniform. Authorities on international law, noted the Court in *Quirin*, were "unanimous in stating that a soldier in uniform who commits the acts mentioned [destroying bridges, war materials, communication facilities, etc.; carrying messages secretly; or other hostile acts] would be entitled to treatment as a prisoner of war." 317 U.S. at 35 n. 12. As the Court stressed, it was only "the absence of uniform that renders the offender liable to trial for violation of the laws of war." *Id.* at 35 n. 12 and 38.

Padilla. Padilla's case is materially different. None of his alleged acts were privileged under the law of war. If he had joined Al Qaeda,[22] he would not thereby have exercised any right under the law of war, but would instead have joined a joint criminal enterprise.[23] If he had set off a

[21] If any of them was a citizen, a question the Court declined to decide, he might have been prosecuted for treason, a crime under domestic law which by definition could not be charged against non-citizens. See 317 U.S at 20, 38.

[22] The government alleges only that he was "closely associated" with it. Pet. Br. 4.

[23] For example, under The International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, 37 I.L.M. 249 (1998) (hereafter "Terrorist Bombing Convention"), a person is guilty of a terrorist bombing if he contributes to the commission of the offense "by

(Continued on following page)

"dirty bomb" in the United States,[24] that, too, would not have been privileged, but a crime of international terrorism.[25] Wearing an Al Qaeda "uniform" would not shield him from prosecution. From beginning to end, he would have been a criminal, not a combatant.

Thus the factual distinctions between *Padilla* and *Quirin* matter. If the allegations against Padilla are true, he is subject to the criminal law. But he is also entitled to all the procedural safeguards guaranteed by the Constitution to any person detained for alleged crimes.

D. *Quirin's* Purported Distinction of *Milligan* Does Not Affect *Padilla*

Quirin construed *Milligan*'s injunction – against military jurisdiction over citizens where civil courts are open and unobstructed – as limited to its facts, namely "that Milligan, not being part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as . . . martial law might constitutionally be established." Hence *Milligan* was "inapplicable" to *Quirin*. *Id.* at 45-46.

This interpretation, that Milligan was not "associated" with the armed forces of the enemy, overlooked certain facts. While he never traveled to rebel states, this Court

a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offense . . ." Art. 2.3(a) and (c).

[24] The government alleges only that he was planning to do so. Pet. Br. 5.

[25] Terrorist Bombing Convention, Art. 2.1.

The Convention does not govern the "activities of armed forces undertaken by military forces of a State in the exercise of their official duties, . . ." Art. 19.2.

Although its codification in treaty form is recent, international practice has long treated terrorist bombings as crimes.

decided his case on the factual premise that he joined a secret organization "holding communication with the enemy" and plotting "armed cooperation with the enemy." The government told this Court that he was "one who holds correspondence with that enemy." USL at 5, 27. Surely constitutional rights to trial by civil court do not turn on whether citizens who collaborate with the enemy choose to do so in person or by mail. If Milligan was not subject to the law of war, then neither is Padilla.[26]

E. A Flawed Proceeding

When Justice Frankfurter later called *Quirin* "not a happy precedent," he was referring to the announcement of judgment before the opinion was written.[27] But this was as much a symptom of broader problems as it was a contributing factor to a dubious judgment.

Both the military proceedings and this Court rushed to judgment. The saboteurs landed on June 12 and 16, 1942. One turned himself in on June 14, and the others were arrested by June 27. On July 2 the President established a military commission. The trial began July 8 and concluded August 1. The commission imposed death sentences August 3. One day later, the President ordered the execution of six of the eight (sparing two who cooperated). On August 8 the six were executed.[28]

Meanwhile, military defense counsel first approached this Court on July 23. Oral argument began on July 29, the same day briefs were filed, and concluded July 30.[29] The Court issued its per curiam decision the next day. Its opinion did not come until three months later – after the six defendants were executed.

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[26] The government does not claim that Padilla was a member of Al Qaeda, but rather that he was "closely associated" with it. Pet.Br. 4.

[27] Fisher at CRS-39 and n. 188.

[28] Fisher at CRS-2-3, 5, 8, 14-15.

[29] *Id.* at CRS-12, 16.

The Court was not fully advised. Attorney General Biddle, who also served as prosecutor before the military commission, told the Court that establishing a military commission responded to the President's "clear duty . . . to provide a speedy, certain and adequate answer, long prescribed by the law of war, to this attack . . ."[30]

Originally, however, the government planned to prosecute the saboteurs in civil court. According to then still secret testimony in the military trial, the FBI told defendant Dasch that he would be indicted and tried in federal court. He agreed to plead guilty "with the understanding that everything would be kept quiet." But after seeing his photo in the newspaper and believing himself betrayed, he withdrew his offer to plead. "He now wanted to go into court and make a full explanation, . . ."[31]

According to Fisher:

> This turn of events helped convince the Administration to choose a secret military trial and prohibit any appeal to civil courts. . . . FBI Director J. Edgar Hoover, having received great credit for discovering the saboteurs, did not want it known that one of them had turned himself in and helped apprehend the others.[32]

To be sure, avoiding embarrassment to the FBI was not the only reason for a secret military trial. The government also hoped to discourage future German U-boat attempts.[33] But FBI embarrassment was a factor.

The secrecy of the military trial kept this information not only from the public, but apparently from this Court as well. The opinion makes no mention of the voluntary surrender, plea agreement or withdrawal. It states only,

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[30] *Id.* at CRS-18 and n. 81.

[31] *Id.* at CRS-3.

[32] *Id.* at CRS-3.

[33] *Id.* at CRS 3-4.

"All were taken into custody . . . by agents of the Federal Bureau of Investigation." 317 U.S. at 21.

The secrecy also kept this Court in the dark on issues of procedural fairness. Two military defense counsel were appointed to represent seven defendants.[34] One objected to the commission that it was difficult to represent all seven, each with differing circumstances, so that "what is said in favor of one may not be favorable to another or may be positively unfavorable." He should not be put in the position of "arraying one of our clients against the other," even though the two arguable U.S. citizens did seem to demand "separate and different consideration."[35] Yet no additional counsel were detailed for the defense.

There were also questions about this Court's independence and impartiality. An *ex parte* communication may have interfered with its independence. As Attorney General Biddle recalled in his memoirs, FDR was determined not to turn over the saboteurs to the courts. "I won't hand them over to any United States marshal armed with a writ of habeas corpus," FDR told Biddle. "Understand?"[36] As explained by one scholar:

> The Attorney General apparently communicated this information to Justice Roberts, for when the Court discussed the case in Conference, Roberts told his colleagues that Biddle feared FDR would execute the saboteurs, regardless of what the Court did. "That would be a dreadful thing," Stone exclaimed.[37]

The impartiality of some Justices was also in question. According to Secretary of War Stimson, one month

[34] *Id.* at CRS-6.

[35] *Id.* at CRS-13.

[36] Francis Biddle, IN BRIEF AUTHORITY 331 (1962).

[37] Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL.W.L.REV. 433, 476 (2002) (footnotes omitted).

before argument, Justice Frankfurter advised him to try the saboteurs by a military commission composed only of soldiers.[38] Justice Byrnes had worked closely with the President and chief prosecutor Biddle on the war effort for months. After the decision, but before the opinion, he resigned to join the Administration.[39]

Perhaps the greatest cloud over *Quirin*, as Justices Frankfurter and Douglas later lamented, was cast by issuing the decision before the opinion. This closed the door on second thoughts. For example, there was a serious question whether the procedures prescribed by law for courts-martial applied to the military commission. Contrary to those procedures, no commission member was a lawyer,[40] and the record was not reviewed by the Judge Advocate General. The opinion reported the Court's "unanimous" view that the procedures did not apply. But it acknowledged that "a majority of the full Court are not agreed on the appropriate grounds for decision" on the issue. 317 U.S. at 47.

Justice Frankfurter evidently had doubts. He consulted military law expert Frederick Bernays Wiener. Shortly after the Court issued its opinion, Wiener advised that FDR's order was "palpably illegal" and that it seemed "too plain for argument" that the record should have been reviewed by a Judge Advocate General before going to the President.[41]

But by then, six defendants had been executed. It was too late for public misgivings.

[38] Stimson Diary, June 29, 1942, at 131, cited in Fisher, CRS-20 and n. 89.

[39] Fisher at CRS-20 and nn. 90-92.

[40] *Id.* at CRS-40.

[41] *Id.* at CRS-35-37.

F. Limited Precedential Value

Quirin decided a different issue on different facts, and expressly limited its narrow holding to that issue and those facts. Under pressure, the Court ruled in haste, without being fully advised. Its opinion did not issue until after six petitioners were already executed. While there is no occasion here to revisit *Quirin*, since it dealt with a separate issue, neither should it be extended beyond its particular facts or the issue it decided.

III. *Hirabayashi* and *Korematsu*: Exaggerating Claims of Military Necessity

The pressures of the times, the tendency of the government to withhold material information, and the Court's vulnerability to both, were further illustrated by the judgments in *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944). *Hirabayashi* upheld a World War II curfew imposed on Japanese American citizens. *Korematsu* upheld their exclusion from areas where they lived and their removal to internment camps.

Both the curfew and the internment were decreed by military order, and purportedly justified on grounds of "military necessity." But this claim has not stood the test of history.

A. The Military Orders

Contrary to the government's implication in *Padilla,*[42] the exclusion order was a military, not a civilian decision.

[42] Without mentioning the military orders or General DeWitt's decision, the government labors to characterize the wartime detention of Japanese Americans as "administered by civilian authority," conducted " 'by a civilian agency, . . . , *not by the military*' " (emphasis in original), and involving "civilian rather than military detentions . . ." Pet. Br. 46 n. 19 (citations omitted). These descriptions are, to say the least, incomplete.

It could not have been otherwise. At the time, "The Justice Department consistently took the view that civilian authorities could not authorize the exclusion of citizens and that the matter should be left to military judgment." *Hirabayashi v. United States*, 828 F.2d 591, 595 (9th Cir. 1987) (footnote omitted).

The decision to issue the curfew and exclusion orders was made by General DeWitt, the officer who issued them. As the Court of Appeals later found, "There has been no showing that General DeWitt even consulted with War Department officials before issuing the orders . . ." 828 F.2d at 599.

B. Misleading Claims of Military Necessity

The Brief for the United States in *Hirabayashi* "justified the exclusion and curfew orders upon what it said was a reasonable judgment of military necessity." *Id.* at 596. It argued, in essence, "that the urgency of the situation made individual hearings to determine loyalty impossible." *Id.*

This Court unanimously accepted the government argument, explaining that

> we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that [Japanese American] population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with . . . 320 U.S. at 99.

One year later, the Court's divided opinions in *Korematsu* again relied heavily "upon the position of the government that there was a perceived military necessity, . . ." 828 F.2d at 603, indeed a "military imperative." 323 U.S. at 219.

Concern about the military risk of possible individual collaborators among Japanese Americans was not frivolous. During 1942 the Japanese shelled targets in California, Oregon, Vancouver and Alaska.[43]

The question of military necessity before this Court in *Hirabayashi*, however, was narrower: whether, as the government argued, "the urgency of the situation made individual hearings to determine loyalty impossible." It was on this issue that the Court deferred to the military's judgment on military necessity.

This was not, in fact, the judgment of the officer who issued the orders. In his report, General DeWitt stated, "It was not that there was insufficient time in which to make a determination; . . ." But after receiving his report, the War Department deleted that sentence. It then added a new phrase: that "time was of the essence." After making other substantive changes, it published "his" report with a new date, and attempted to destroy all copies of the original. 828 F.2d at 597-98.

When the Justice Department lawyer who was the principal author of the government's brief asked for a copy of the original report, "the War Department gave him only a few selected pages." *Id.* at 599. A copy of the original report was discovered only decades later in the National Archives. *Id.* at 593, 598.

General DeWitt, as the government conceded years later, "acted on the basis of his own racist views and not on the basis of any military judgment that time was of the essence." *Id.* at 601.

The War Department's version of General DeWitt's report became public in time for the briefing of *Korematsu*. *Id.* at 602. Justice Department officials at the time were of the view that it contained "willful historical inaccuracies and intentional falsehoods." *Korematsu v. United States*, 584 F. Supp. 1406, 1418 (N.D. Cal. 1984). "The record is

[43] Rehnquist at 197-98.

replete with protestations of various Justice Department officials that the government had the obligation to advise the courts of the contrary facts and opinions." *Id.*

But the government did not do so. A draft government brief would have advised that the report's "recital of the circumstances justifying the evacuation as a matter of military necessity, . . . , is in several respects, . . . in conflict with information in the possession of the Department of Justice." *Id.* at 1417. The final brief deleted that sentence. *Id.* at 1418. Also omitted was information from the Federal Communications Commission, Department of the Navy and Justice Department "which directly contradicted General DeWitt's statements." *Id.* at 1419.

C. The Lesson of *Korematsu*

Congress in 1980 established a Commission on Wartime Relocation and Internment of Civilians. Pub. L. No. 96-317, section 2, 94 Stat. 964 (1980), "composed of former members of Congress, the Supreme Court and the Cabinet as well as distinguished private citizens." 584 F. Supp. at 1416. Their unanimous conclusion was that military necessity did not warrant exclusion and internment of Japanese Americans. Instead, the "broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership." As a result, "a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any other probative evidence against them, were excluded, removed and detained . . ." *Id.* at 1416-17, quoting the Commission's Report, *Personal Justice Denied* (1982) at 18.

The district court that later vacated Fred Korematsu's conviction concluded that this Court's ill-advised 1944 judgment "stands as a caution that in times of stress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability." 584 F. Supp. at 1420.

CONCLUSION

Nearly two years have passed since the military took custody of Jose Padilla from a federal court in New York City. It detains him in South Carolina on a claim of military necessity, without due process of law, despite an express statutory prohibition of detention of a United States citizen without congressional authorization.

The history of the overstated claims of military necessity in *Milligan, Quirin, Hirabayashi* and *Korematsu*, and of the resulting violations of liberty and due process of law, confirms the wisdom of the judgment of the Court of Appeals in this case. In *Milligan*, this Court corrected wartime military excess; in *Quirin* it unwittingly participated in such excess. The applicable precedent – and the one consistent with this nation's cherished tradition of the rule of law – is *Milligan*, not *Quirin*. *Amici* urge this Court to affirm the ruling below that Jose Padilla be released from military custody and, if warranted, returned to the civil courts.

Respectfully submitted,

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No. 03-1027

APR 9 -2004

IN THE

Supreme Court of the United States

DONALD RUMSFELD,

Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
as NEXT FRIEND OF JOSE PADILLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE HON. SHIRLEY M. HUFSTEDLER, HON. NATHANIEL R. JONES, HON. WILLIAM A. NORRIS, HON. H. LEE SAROKIN, HON. HERBERT J. STERN, HON. HAROLD R. TYLER, JR., R. SCOTT GREATHEAD, ROBERT M. PENNOYER, BARBARA PAUL ROBINSON, AND WILLIAM D. ZABEL IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Question 2 of the questions presented, as set forth in Petitioner's Brief, is as follows:

> Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, to seize and detain a United States citizen in the United States based on a determination by the President that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts, or whether 18 U.S.C. 4001(a) precludes that exercise of Presidential authority.

This brief does not address whether, in the abstract, the President has the power to detain an enemy combatant. Amici assert that, even if such power potentially exists either under Article II of the Constitution alone or with congressional authorization, it can only be exercised in conformity with the due process rights of the detainee guaranteed by the Fifth Amendment.

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INTRODUCTION

The power of the Executive to arrest a citizen, declare that citizen an enemy of the state, and hold that citizen incommunicado in indefinite detention beyond independent judicial scrutiny is the hallmark of despotism. In its assertion of a power of indefinite detention on unproven charges, in its failure to disclose its definition of "enemy combatant" on which the detention hinges, in its refusal to submit to any procedures in which the factual grounds for the detention can be contested, and in its insistence that the detainee have no access to counsel already engaged to represent him, the Executive in this case lays claim to unprecedented power over American citizens, and seeks to defend before this Court a regime that bears no resemblance to anything recognizable as due process of law.

A group of substantially the same amici as are filing this brief recently submitted an amicus brief in *Hamdi v. Rumsfeld*, No. 03-6696 (filed Feb. 23, 2004). In that brief, amici demonstrate that the historic role of habeas corpus, and its unique importance in implementing the constitutional separation of powers, guarantees meaningful, independent judicial review of the asserted factual as well as legal grounds for executive detention. In the present brief, amici examine the due process limitations on the exercise of any assumed executive power to detain citizens as "enemy combatants." The briefs are complementary and intended to be read together.[1]

---

1. This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk. No counsel for the parties has authored this brief in whole or in part. No person other than amici and their counsel has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST OF AMICI

Amici, the former federal judges and attorneys listed below who have devoted their careers to promoting the rule of law as implemented in our nation's courts, have an abiding interest in the independence of the judiciary as a check on the actions of the executive branch.

Judge Shirley M. Hufstedler served as a judge on the United States Court of Appeals for the Ninth Circuit from 1968 to 1979. She has also served as the United States Secretary of Education.

Judge Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002.

Judge William A. Norris served as a judge on the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.

Judge H. Lee Sarokin served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and on the United States Court of Appeals for the Third Circuit from 1994 to 1996.

Judge Herbert J. Stern served as a judge on the United States District Court for the District of New Jersey from 1973 to 1987. He also served as the United States Judge for Berlin from 1979 to 1980.

Judge Harold R. Tyler, Jr. served as a judge on the United States District Court for the Southern District of New York from 1962 to 1975. He has also served as the Deputy Attorney General of the United States, an Assistant Attorney General of the United States Department of Justice Civil Rights Division, and an Assistant United States Attorney.

R. Scott Greathead is a member of the New York bar and an international human rights advocate. He has traveled to more than a dozen countries to advocate the rights of persons under executive detention.

Robert M. Pennoyer is an attorney in private practice in New York City. He has served as an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office for the Southern District of New York, the Assistant to the General Counsel of the Department of Defense, and the Special Assistant to the Assistant Secretary of Defense for International Security Affairs.

Barbara Paul Robinson is an attorney in private practice in New York City. She is a former President of the Association of the Bar of the City of New York.

William D. Zabel is an attorney in private practice in New York City and is the Chair of Human Rights First, formerly known as the Lawyers Committee for Human Rights.

STATEMENT OF THE CASE

Amici respectfully refer the Court to the Brief for Respondents for a full statement of the case.

SUMMARY OF ARGUMENT

The Court has power and discretion to decide what process is due to a citizen detained as an "enemy combatant," as a question fairly presented by the petition for certiorari. If the Court decides that, notwithstanding the Non-Detention Act, 18 U.S.C. § 4001(a)(2000), the Executive has such power, it *should* reach the due process issues because the constitutional legitimacy of the Executive's asserted power

to detain cannot be assessed separately from the protections for individual rights that are afforded when such power is exercised. (Point I).

The long-term deprivation of Mr. Padilla's liberty cannot constitutionally be accomplished without affording Mr. Padilla the essentials of due process: notice of the grounds for his detention and a meaningful opportunity to be heard to contest those grounds, both legally and factually. While notice and a hearing may be deferred to a point in time after the initial detention where it would be impossible or improvident to grant a pre-deprivation hearing, due process must be afforded promptly thereafter, as determined by the courts. (Point II).

In order to effectuate Mr. Padilla's due process rights, he must be afforded meaningful access to and assistance of counsel as of right. Doing so will not interfere with legitimate national security concerns. (Point III).

In order to effectuate Mr. Padilla's due process rights, and to maintain the independence of the judiciary as the cornerstone of the separation of powers, the burden and standard of proof must be allocated properly. Once a habeas petition is filed that *prima facie* demonstrates that the petitioner has been deprived of a liberty interest protected by the Due Process Clause and that no prior constitutionally adequate proceedings have occurred to establish the basis for the detention, the burden lies with the Executive to justify the detention. It must do so by at least clear and convincing evidence, because the habeas court is sitting not in collateral review of a prior adjudication but by default as the initial forum. The "some evidence" standard is not sufficient where there has been no prior judicial or quasi-judicial process whatsoever. (Point IV).

ARGUMENT

I. This Court Can And Should Address The Due Process Standards To Which The Government Must Adhere In Establishing Grounds For Mr. Padilla's Detention

Even if this Court should find that the Executive has the power to detain an enemy combatant, such power can under no circumstances be exercised with indifference to the right of the detainee not to be deprived of liberty without due process of law. The power to detain, if it exists, is not absolute, and the legitimacy of its exercise in a particular case cannot be assessed without scrutiny of the procedures employed to establish that grounds for detention exist. For that reason, if the Court holds that the Executive, at least under some conditions, does have the power to detain an enemy combatant, the Court can and should address the procedural safeguards that are necessary to render such a detention constitutionally tolerable by assuring a reliable determination that the detainee *is* in fact an enemy combatant.

This Court has the power and broad discretion to reach the due process issues. Those issues, although not expressly set forth in the question presented in the petition for certiorari, are "fairly included" within it, *see* Supreme Court Rule 14(1), because the due process issues are "predicate to intelligent resolution" of the question expressly presented in the petition, and essential to proper analysis of the government's claim of power to detain an enemy combatant. *Vance v. Terrazas*, 444 U.S. 252, 259 n.5 (1980).[2]

2. The Court has also reached questions expressly presented (as are the due process issues here) by a respondent's brief, *see Almota Farmers Elevator & Wholesale v. United States*, 409 U.S. 470, 473 n.1 (1973), a question presented by amici, *see Teague v. Lane*, 489 U.S. 288, 300 (1989), or based on the Court's own determination that the issue is significant, even if not discussed by the parties. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), discussed in *Blonder-Tongue Labs, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 320 n.6 (1971).

The due process issues were not reached by the Second Circuit below because of its conclusion that the Executive did not possess the authority to detain Mr. Padilla, *Padilla v. Rumsfeld*, 352 F.3d 695, 699 n.1 (2d Cir. 2004), but were fully briefed in the courts below and are the subject of extensive analysis by Chief Judge Mukasey in the district court, see *Padilla v. Bush*, 233 F. Supp. 2d 564, 599-610 (S.D.N.Y. 2002) and *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 49-57 (S.D.N.Y. 2003) (on motion for reconsideration), and relied on by Judge Wesley in the Second Circuit as well. 352 F.3d at 732-33. They also have been extensively briefed in the *Hamdi* case, now before the Court. *See* Brief for Petitioners, *Hamdi v. Rumsfeld*, No. 03-6696 (filed February 23, 2004) at 14-24; Brief for the Respondents, *id.* (filed March 29, 2004), at 34-49. The government also has an opportunity, in its reply brief in this case, to expand on those issues.

In sum, if this Court determines that the Executive has power to detain Mr. Padilla, that is merely the beginning and not the end of the vital constitutional questions presented by this case. The exercise of any such power must comport with the safeguards for individual liberty that are established in the Constitution.

II. The Fifth Amendment Guarantees Mr. Padilla Notice And An Opportunity To Be Heard In An Adversary Hearing

A. Notice of the Facts Alleged In Support of Detention and an Opportunity to Be Heard in Opposition Are Essential To Due Process

The Due Process Clause of the Fifth Amendment "provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Ed.*

v. Loudermill, 470 U.S. 532, 541 (1985). At root, due process means fundamental fairness. *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 24 (1981). A judicial result, however harsh, derives legitimacy in large part from the fairness of the procedures employed in reaching it. As stated by Justice Frankfurter:

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 169-172 (1951) (Frankfurter, J., concurring); *accord*, *In re Gault*, 387 U.S. 1, 21 (1967); *see also Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("[A] person cannot incur the loss of liberty for an offense without notice and an opportunity to be heard.").

Mr. Padilla's interest in liberty from physical detention is a constitutionally-protected interest of the highest order. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). This Court has referred to the right to physical liberty as a right of "transcending value," necessitating a high level of constitutional protection against arbitrary or unjustified deprivations. *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958) ("The contours of this historic liberty interest . . . always have been thought to encompass . . . freedom from bodily restraint and punishment."). The deprivation here is both complete and of indefinite duration.

As this Court recently held, "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Zadvydas*, 533 U.S. at 689. If that is so, the assertion of executive power, ungoverned by any statutory authorization or procedural scheme, to apprehend an American citizen and hold him incommunicado for the duration of an undeclared and potentially never-ending "war on terrorism" presents more than a constitutional "problem." It is a direct challenge to the rule of law embodied in the Due Process Clause of the Constitution. As *Zadvydas* and earlier decisions of this Court make plain, government detention of an individual violates the Due Process Clause unless the detention is ordered in a criminal proceeding or in a few, narrowly circumscribed instances, where special justification for non-punitive detention exists. *Id.* at 690; *see also Kansas v. Hendricks*, 521 U.S. 346 (1997) (commitment for mental illness); *United States v. Salerno*, 481 U.S. 739 (1987) (pre-trial detention).

Even in the very narrow range of circumstances in which the Court has considered statutory non-criminal detention schemes, it has strictly scrutinized the safeguards provided for protection of the detainee's rights and "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals *and* subject to strong procedural protections." *Zadvydas*, 533 U.S. at 690-91 (emphasis supplied) (detention of removable aliens). Although "suspected terrorists" might qualify as a class of "specially dangerous individuals," *id.*, the quoted language makes clear that even members of such a class are entitled to strong procedural protections in the event of detention. *See also id.* at 721-22 (Kennedy, J., dissenting) (compliance with due process requires "adequate procedures" to review immigration detainees' cases). Here, where the Executive asserts inherent constitutional authority to engage in such detention – in the absence of any specific statutory scheme that might otherwise structure or constrain that authority –

it is even more important that procedural protections be observed. *Cf. Hendricks*, 521 U.S. at 353 (statutory scheme of civil commitment for mental illness met due process requirements where individual was provided counsel, the right to present evidence and cross-examine witnesses, and access to the government's evidence against him); *Schall v. Martin*, 467 U.S. 253, 275-77 (1983) (statute providing for pre-trial detention of a juvenile offender must provide adequate "procedural safeguards"; requirement satisfied where statute provided for formal hearing at initial appearance, and "formal, adversarial hearing" no more than six days later, wherein juvenile was provided counsel and an opportunity to present evidence and cross-examine witnesses).

The Court has often reminded us that due process is a flexible concept that takes its meaning in a specific case from the weight of the individual interest at stake and the potency of the countervailing governmental need. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 10 (1991); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). Yet, harmonizing those competing interests has never resulted in total abrogation of the individual right to physical liberty without *any* process at all. In this case as much as in any other the Court has decided, a way must be found to accommodate legitimate governmental interests while preserving the due process rights of the individual, the universally recognized elements of which are notice and an opportunity to be heard. *Powell v. Alabama*, 287 U.S. 45, 68 (1932).

(1) *Notice* – It is not sufficient simply to apprise an individual that the government intends to take action against him. As this Court has stated, due process "principles require that a recipient have timely and adequate notice detailing the reasons" for an adverse government action. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970). *See also Brock v. Roadway*

Express, Inc., 481 U.S. 252, 264-65 (1987) ("the constitutional requirement of a meaningful opportunity to respond before a temporary deprivation may take effect entails, at a minimum, the right to be informed not only of the nature of the charges but also of the substance of the relevant supporting evidence"); *Gault*, 387 U.S. at 33-34 ("Due process of law . . . does not allow a hearing to be held in which a youth's freedom . . . [is] at stake without giving [him] timely notice, in advance of the hearing, of the specific issues that [he] must meet.")

(2) *The Right to a Hearing* – "The fundamental requisite of due process is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). It is an "opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). This Court has recognized that an adversary proceeding is essential to preserving a meaningful right to be heard. "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993).

Providing an adversary hearing when significant rights are at stake is both fundamentally fair and the best way to minimize the risk of errors that would undermine the legitimacy of the deprivation. In *Loudermill*, this Court held that "some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision" where factual disputes exist. 470 U.S. at 543. Likewise, under the Due Process Clause a "skeletal affidavit" submitted by one side is an insufficient basis on which a judge or other factfinder could base a factual determination, because such an affidavit constitutes a "one-sided, self-serving, and conclusory submission," reliance on which creates a high likelihood of error, *Doehr*, 501 U.S. at 14 – words that could have been written for this case. *See also Ford v. Wainwright*, 477 U.S. 399, 414-15 (1986)

(recognizing high risk of error when no adversarial process exists to provide the factfinder with "potentially probative information").

At minimum, therefore, a meaningful right to be heard encompasses the right to present facts favorable to one's case, and, perhaps more importantly, to rebut or challenge facts asserted by the other side. Here, so far as the record discloses, Mr. Padilla has received no notice whatsoever of the grounds for his detention or the allegations of fact or supporting evidence on which the Executive relies. *See* Amended Petition for Writ of Habeas Corpus, J.A. 46-57 at ¶¶ 4-5 (alleging that Mr. Padilla has not been given notice of the grounds for his detention). Nor has he received anything approaching a "meaningful" right to be heard. The government seeks to impose a deprivation of liberty on Mr. Padilla based only upon the unchallenged, unreviewed, and unrebutted allegations in its own affidavits. The risk of error inherent in such non-process, in which the Executive is the judge of its own case, is self-evident. The Executive's institutional role in times of a national security crisis is to safeguard the nation from danger, and the temptation to mistake suspicion for fact under those circumstances is unavoidable. *See Duncan v. Kahanamoku*, 327 U.S. 304, 329 (1946) (Murphy, J., concurring) (refusing to "abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war"). Moreover, despite even diligent and good faith inquiry, the Executive may be unaware of exculpatory facts sufficient to dispel suspicion.[3] And, finally, the absence of a forum for independent decisionmaking by a court that has heard the evidence submitted by both sides creates the ultimate risk of

3. News reports from the "war on terror" highlight the potential for error where determinations of guilt are made in the absence of process. *See* Amicus Brief of Judge Nathaniel R. Jones, et al., *Hamdi v. Rumsfeld*, No. 03-6696, at 6 nn.7-10 (filed Feb. 23, 2004).

error: arbitrary or intentional acts of detention by an overreaching Executive who could declare any U.S. citizen an enemy of the state and detain him on unsubstantiated charges.

B. Any Executive Authority to Restrict a Detainee's Due Process Rights Must be Rigorously Limited to Demonstrated Exigent Circumstances Particular to the Detainee

The Executive contends that the exercise of its claimed military power in "wartime" to detain "enemy combatants" somehow changes the calculus so profoundly that due process must be swept away on the strength of national security concerns. The argument is circular, as it assumes as true the jurisdictional fact that the government has yet to prove: that Mr. Padilla is an enemy combatant. The government's position reflects not so much a compelling security interest in detaining "enemy combatants" as it does a desire to detain anyone whom it *says* is an enemy combatant without permitting any inquiry into whether the allegation is true. It is a claim reminiscent of the now-discredited World War II decisions that led to thousands of loyal American citizens being deprived of their liberty without opportunity to contest the assumptions that underlay their detention. *See Korematsu v. United States*, 323 U.S. 214 (1944) (upholding exclusion order of citizens of Japanese ancestry); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding curfew for citizens of Japanese ancestry).

This Court has never accepted the extreme position that national security concerns, or the exercise of military power, completely override due process. For example, in a case considering the government's revocation of a defense worker's security clearance for national security reasons, this Court held that the right to rebut the government's evidence

– a hallmark of due process – was essential to the reasonableness of the outcome:

> While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots.

Greene v. McElroy, 360 U.S. 474, 496 (1959). The Court's concern about the reliability of evidence to support a deprivation of rights speaks directly to the present case, where the Executive admits that some of the evidence against Mr. Padilla comes from informants who have not been completely truthful, who may have a motivation to deceive and who have recanted some of their allegations. Declaration of Michael H. Mobbs, August 27, 2002, Pet. App. 167a-172a, at 168a n.1.

Similarly, in the context of reviewing decisions of courts-martial on petitions for habeas corpus, the Court has explained that due process requires *de novo* review for claims that the court-martial did not adequately consider:

> [t]he constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which

> have long been recognized and honored by the military courts as well as the civil courts.

Burns v. Wilson, 346 U.S. 137, 142-43 (1953) (plurality op.). And, in *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922), the Court held that the Due Process Clause requires Article III courts to conduct full *de novo* review of the jurisdictional fact of citizenship in immigration cases, noting that "[t]he situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service." The Court found it "well settled" that the courts could review the jurisdictional fact of the defendant's military status. *Id.* at 284; *United States v. Grimley*, 137 U.S. 147, 150 (1890); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *see also Givens v. Zerbst*, 255 U.S. 11, 20 (1921); *Ver Mehren v. Sirmyer*, 36 F.2d 876, 880 (8th Cir. 1929).[4]

The Court's precedents, therefore, provide no support for the proposition that the Executive's military powers, or even compelling national security concerns, can eliminate an individual's due process rights. "The cost of protecting a constitutional right cannot justify its total denial." *Bounds v. Smith*, 430 U.S. 817, 825 (1977). At most, the Executive's interests can affect the timing and content of the process that is due. For example, the Court has repeatedly confronted cases in which a hearing prior to the deprivation of a

4. *In re Quirin*, 317 U.S. 1 (1942), decided only that a military tribunal was an appropriate forum in which to try the German saboteurs, who did not contest the essential factual allegations against them. *Id.* at 45. Nothing in *Quirin* supports the claimed executive power to hold alleged enemy combatants in indefinite detention without a hearing. The Court's affirmation of the petitioners' right to present their constitutional claims in court (even in the face of a Presidential Proclamation purporting to deny such access, *id.* at 24), flies in the face of the Executive's position in this case seeking to minimize if not eliminate Mr. Padilla's right to a meaningful hearing.

constitutionally protected interest was claimed to be impossible, impractical, or contrary to some governmental interest. *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-79 (1974); *see also N. Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 315-16 (1908). In such cases, this Court has consistently required some showing of exigent circumstances necessitating "quick action by the State," *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), or other "countervailing state interest of overriding significance," *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), to justify deferring the notice and hearing that due process otherwise requires.

While deferring the right to a hearing can therefore satisfy due process requirements in extraordinary circumstances, it does not provide the government with carte-blanche authority to deny a hearing altogether or to delay it beyond the time when the immediate emergency has dissipated. Purported wartime measures are not exempt from that principle; while the Court has upheld emergency measures in both World War I and World War II that deferred a hearing until after a governmental deprivation of property, in each case there was an opportunity to contest the deprivation after it occurred. *See Stoehr v. Wallace*, 255 U.S. 239 (1921) (seizure of enemy alien property); *Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1921) (same); *see also Bowles v. Willingham*, 321 U.S. 503, 521 (1944) (Emergency Price Control Act provided for contest by landlord of order fixing rents after it issued).

The fact that a post-deprivation hearing may be deemed an adequate remedy does not vitiate the requirement that a hearing be held "at a meaningful time and in a meaningful manner." *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 n. 22 (1990). "At some point, a delay in the post-termination hearing . . . become[s] a constitutional violation." *Loudermill*, 470 U.S. at 547; *see also Barry v. Barchi*, 443 U.S. 55, 65 (1979) (finding

that a statute imposing no time limit within which an administrative hearing must be held after suspension of state license did not pass constitutional muster; rather, due process required a "prompt proceeding and a prompt disposition").[5] While there is no bright-line rule defining the outer limits of a "meaningful time," *see United States v. $8,850*, 461 U.S. 555, 562 (1983), that requirement is clearly not satisfied where a hearing is denied for months and, as here, years after the initial deprivation with no justification specific to this detainee. When this Court has permitted governmental interests to effect some adjustment in the process due the individual, it has taken care to limit the incursion on individual rights to that which is necessary to satisfy the governmental necessity. *See, e.g., Salerno*, 481 U.S. at 747 (detention must not be "excessive" means of fulfilling government purpose); *see also Padilla*, 233 F. Supp. 2d at 610 (government's need to detain may be "mooted" by the passage of time).

Here, the government deems the continuing menace of al Qaeda and the war on terror the emergent situation that justifies the deprivation of Mr. Padilla's liberty, but that war may persist indefinitely, and a detainee's hearing cannot await a declaration of victory or an act of grace by the Executive. The Executive's national security responsibilities surely permit it to interdict imminent harm by seizing those who pose a threat before due process is afforded, but that is an

5. Analogously, under the Fourth Amendment, in cases where the requirement of a pre-arrest warrant is excused, a hearing must be provided as soon as reasonably possible after the arrest to comply with constitutional requirements. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975) ("[o]nce the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate" and the detainee is entitled to a "prompt" hearing as a prerequisite to "extended restraint"); *Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (individual subject to warrantless arrest must generally be provided with hearing within 48 hours of arrest).

exigent circumstance linked to the particular circumstances of an individual detainee, and one that plainly diminishes over time. The generalized interest in holding all detainees indefinitely without hearing or access to counsel in the hope of extracting all possible information from each one of them cannot be a sufficient basis to deny due process, if that constitutional guarantee is to have any meaning. In the absence of a controlling and constitutionally acceptable statutory scheme, exactly where to draw the line can only be assessed on a case-by-case basis.[6] But it must be based on specific circumstances of the particular detainee, and it must be a decision of the independent judiciary, not the *ipse dixit* of the detainer.

6. In statutes that do not apply to the case of Mr. Padilla, Congress has legislated procedures to govern detention of certain alleged terrorists. In the Anti-Terrorist and Effective Death Penalty Act of 1996, Congress provided that in a removal hearing, aliens detained on suspicion of terrorism would be afforded assistance of counsel, 8 U.S.C. § 1534(c)(1)(2000), while the USA Patriot Act requires that within seven days of the detention of an alien based on national security concerns, the Attorney General must either commence removal or criminal proceedings, 8 U.S.C. § 1226a(a)(2003) – legislative judgments that stand in stark contrast to the treatment of Mr. Padilla by the Executive. Similarly, during the Civil War, Congress authorized the suspension of the writ of habeas corpus but required that the names of all persons held by the President, "other than as prisoners of war," must be furnished to the federal courts, and that those persons must be discharged if not indicted as of the end of the session of the current grand jury. *See Ex parte Milligan*, 71 U.S. 2, 5 (1866).

III. Mr. Padilla Has A Constitutional Right To Counsel To Challenge The Executive's Enemy Combatant Designation

A. Due Process Requires That Mr. Padilla Be Afforded Access to, and Assistance of, His Counsel

Chief Judge Mukasey held that Mr. Padilla's right to present facts in connection with his habeas corpus petition "will be destroyed utterly if he is not allowed to consult with counsel." *Padilla*, 233 F. Supp. 2d at 604. Circuit Judge Wesley agreed: "Mr. Padilla's right to pursue a remedy through the writ would be meaningless if he had to do so alone." *Padilla*, 352 F.3d at 732. The habeas hearing will be Mr. Padilla's first and perhaps only opportunity to contest the Executive's enemy combatant designation. That hearing would be a charade if Mr. Padilla were disabled from consulting his counsel in confidence to prepare for the hearing and appearing side-by-side with his counsel at the hearing to present his case. Indeed, in every military detention case of which we are aware, the detainees were represented by counsel, and there is no hint that their right to unimpaired access to counsel was questioned. *See, e.g., In re Yamashita*, 327 U.S. 1, 6 (1946); *In re Quirin*, 317 U.S. 1, 23-24 (1942); *Ex parte Milligan*, 71 U.S. 2, 8-9 (1866); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946).[7]

This Court has repeatedly protected the right to counsel in non-criminal proceedings implicating liberty interests within the ambit of the Due Process Clause. *Gault*, 387 U.S. at 41, *Vitek v. Jones*, 445 U.S. 480, 497-500 (1980) (opinion

7. While Mr. Padilla has recently been granted, at the discretion of the government, a very limited right to meet with his lawyers in the presence of military officials, see Brief for Petitioner at 12 n.5, this should not affect this Court's consideration of the instant claim that Mr. Padilla as a matter of right is entitled to access to and assistance of his counsel.

of White, J.); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).[8] The Due Process Clause creates a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Lassiter*, 452 U.S. at 27.

The presumption that there is a right to counsel applies to Mr. Padilla because, the habeas corpus proceeding is his first and perhaps only opportunity to challenge the deprivation of his physical liberty. Moreover, because the Government's designation of Mr. Padilla as an enemy combatant is based on alleged illegal activity, Mr. Padilla's already fundamental interest in physical liberty "may be supplemented by the dangers of criminal liability" inherent in a proceeding at which he contests his involvement in the alleged illegal activity. *Id.* at 31. Mr. Padilla, therefore, needs the assistance of counsel not only to effectively contest his designation as an enemy combatant but also to ensure that his statements at the hearing do not place him in future legal jeopardy.

The possibility of an erroneous decision in the absence of counsel is high. Mr. Padilla's need to consult with a lawyer

8. Mr. Padilla may also be entitled to counsel under the 6th Amendment, because his detention, while not formally commenced by criminal charges, is essentially punitive in intent. *See Middendorf v. Henry*, 425 U.S. 25, 39-42 (1976) (adopting functional approach to whether particular proceeding was tantamount to a criminal prosecution for 6th Amendment purposes). Mr. Padilla's detention is punitive because the Executive has declared all alleged al-Qaeda associates to be "unlawful" combatants, and has used that charge to deprive them of the rights of prisoners of war under the Geneva Convention, such as the right to be free from unduly coercive interrogation. *See* Brief for the Respondents in Opposition to Petition for Writ of Certiorari, *Hamdi v. Rumsfeld*, No. 03-6696 (filed December 3, 2003), at 24, 29; *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

to help him to present and contest facts is obvious. *See Padilla*, 233 F. Supp. 2d at 602. Mr. Padilla's need for assistance in building a factual record is far more acute than in the ordinary habeas case, in which a factual record and resultant findings already exist. In any event, "he has no ability to make fact-based arguments because, as is not disputed, he has been held incommunicado during his confinement." *Id.*

B. The Government's Asserted Interests Do Not Justify Denial of Counsel

The government's asserted needs here to incapacitate and interrogate detainees such as Mr. Padilla do not justify indefinite detention without notice, hearing, or access to counsel. Indeed, the district court observed that the Jacoby Declaration submitted by government, see J.A. 75-88, was devoid of factual support for those alleged justifications either generally or in the case of Mr. Padilla. *See Padilla*, 243 F. Supp. 2d at 52-53 (motion on reconsideration). The district court also held that denial of all access to counsel was not narrowly tailored to achieve the Government's stated objectives. *See Padilla*, 233 F. Supp. 2d at 603-605.[9]

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9. The government's contention in the courts below that Mr. Padilla should have no access to his counsel was particularly troubling, because Mr. Padilla (through his counsel and next friend) was not asking that counsel be appointed for him, only that he have access to an attorney already acting for him. As this Court observed in *Powell v. Alabama*, 287 U.S. 45, 69 (1932),

> [i]f in any case, civil [or] criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

(Cont'd)

The government's legitimate interest in incapacitating persons who would threaten the nation's safety is served as well by criminal prosecution as it is by military detention, and therefore provides no support for the government's implicit position that remitting Mr. Padilla to the criminal justice system would frustrate its national security objectives. Indeed, the criminal justice system had so successfully incapacitated Mr. Padilla that the military needed only arrive at the civilian jail house and peacefully escort him to his military prison.

The government also asserts the need to interrogate Mr. Padilla without interference from counsel or hope of release. But the need to interrogate the detainee without interference by counsel or court is both unsubstantiated as a matter of fact and illegitimate as a matter of law.

Chief Judge Mukasey made a finding that Mr. Padilla's contact with counsel would cause "minimal or nonexistent" interference with the government's then-continuing interrogation. *Padilla*, 233 F. Supp. 2d at 603. Moreover, if the detainee were granted a timely hearing that resulted in confirmation of his status, interrogation could proceed thereafter. If, as it maintains, the Executive is seeking to create a sense of hopelessness and dependency in the detainee, the surest way to do so is to accelerate to conclusion rather than delay a hearing and judicial review of his case, as the district court observed. *Padilla*, 243 F. Supp. 2d at 52 (on motion for reconsideration). Thereafter, the detainee will have strong incentives to cooperate as the only way to "cut his losses." *Id.* at n.7. The criminal justice system

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(Cont'd)

See also Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (even where the constitution does not require that the government provide counsel, due process requires that a person threatened with a deprivation of property "must be allowed to retain an attorney if he so desires").

provides the same incentives, which in other cases the Department of Justice has exploited specifically in the context of the "war on terror":

> The Department [of Justice] also used one of the most effective tools at the government's disposal – the leverage of criminal charges and long prison sentences. As is often the case with criminal defendants, when individuals realize that they face a long prison term like those under the PATRIOT Act, they will try to cut their prison time by pleading guilty and cooperating with the government
>
> In fact, since September 11, we have obtained criminal plea agreements, many under seal, from more than 15 individuals, who must – and will continue to – cooperate with the government in its terrorist investigations.

(Testimony of Attorney General John Ashscroft, U.S. House of Representatives, Committee on the Judiciary, June 5, 2003, available at *http://www.usdoj.gov/ag/testimony/2003/060503aghouseremarks.htm.*)

In sum, the government has multiple lawful means of obtaining information from Mr. Padilla, both in the civilian criminal justice system and in a properly authorized and regulated regime of executive detention that honors the detainee's procedural due process rights. The government, however, has no legitimate interest in interrogation that violates individual rights guaranteed by the Constitution. Indeed, the Executive's generalized interest in holding Mr. Padilla incommunicado for interrogation also proves too much, as the Executive can plausibly assert that by such tactics it may be able to obtain useful information from any

military detainee, or for that matter any person accused of crime. Our Constitution long ago rejected such arguments as "sufficient reason" to override individual rights. *See Chavez v. Martinez*, 123 S. Ct. 1994, 2008 (2003); *id.* at 2012 (Stevens, J., concurring in part); *id.* at 2016 (Kennedy, J., concurring in part). *See also Riverside v. McLaughlin*, 500 U.S. 44, 61 (1991) (Scalia, J., dissenting: "[I]t was clear [at common law] . . . that the only element bearing upon the reasonableness of delay was not such circumstances as the pressing need to conduct further investigation, but the arresting officer's ability, once the prisoner had been secured, to reach a magistrate who could issue the needed warrant for further detention."). Similarly, the judgment of other democratic nations has been to afford accused terrorists access to counsel soon after they are apprehended.[10]

IV. Due Process Requires The Executive To Prove By Clear And Convincing Evidence That Mr. Padilla Is An Enemy Combatant

The Executive does not dispute that no judicial or quasi-judicial forum has considered its claim that Mr. Padilla is an enemy combatant. The Executive relies exclusively on untested facts within its own control, and which have not

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10. For example, British law guarantees citizens in Padilla's position access to a lawyer as soon as practicable and within 48 hours in all cases. Terrorism Act 2000, c. 11, sched. 8 ¶¶ 7-9 (Eng.). The 2002 Israeli law allowing the detention of so-called "unlawful combatants" guarantees access to counsel and requires that the detainee be brought before a court within fourteen days. Incarceration of Unlawful Combatants Law, 5762-2002, § 6, § 5(a). India's 2002 counter-terrorism law requires that a suspected terrorist be informed of the right to counsel upon reaching the police station; have access to counsel during the interrogation process; and be detained no longer than ninety days, unless a special court approves an extended detention. Prevention of Terrorism Act, Act No. 15 of 2002, § 52 ¶¶ 2, 4, § 49 ¶ 4.

been exposed to legal challenge, to support its continued detention of Mr. Padilla. Because the Executive has never before laid claim to the awesome power to detain citizens without due process, amici are aware of no precedent directly on point that establishes the standards and burdens of proof that must be applied in this situation in order to comport with due process. The Court's precedents, however, as well as logic and fairness, command the conclusion that once a detainee such as Mr. Padilla sets forth a *prima facie* case that he has been detained without the benefit of any prior fact-finding procedures to establish the grounds for detention, the burden must be on the government to establish by at least clear and convincing evidence to the satisfaction of the habeas court that constitutionally acceptable grounds for detention exist at the time the hearing is held. The "some evidence" standard proposed by the district court, see *Padilla*, 233 F. Supp. 2d at 610, is an inapposite standard used for review of previously-made judicial or quasi-judicial findings, not a burden of proof, and cannot constitutionally be applied here where no prior hearing has occurred and no tribunal has made findings based on evidence relevant to the constitutionality of the detention.

A. The Executive Bears the Burden of Proof

Because Mr. Padilla has never been afforded any hearing, the government has never been called upon to persuade any judicial officer or tribunal that Mr. Padilla is an enemy combatant. In a habeas proceeding that seeks collateral review of a prior judicial determination, the party that files the writ bears the burden to establish that there has been a constitutional deprivation. *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938); *see* 28 U.S.C. § 2254(e)(1)(2000) (prior state-court proceeding is "presumed correct" unless the petitioner can rebut that presumption with "clear and convincing evidence"); *e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

Underlying that allocation of the burden of proof is the "presumption of regularity which the record of the trial imports. . . ." *Walker v. Johnston*, 312 U.S. 275, 286 (1941).

Here, however, there has been no trial; there is no record. There has not been even a hint of a constitutionally adequate proceeding. Mr. Padilla cannot reasonably be asked to prove the negative: that he is not an enemy combatant. In this case, the burden of proof must lie with the government to prove the essential jurisdictional facts that justify the deprivation of liberty. *See, e.g.*, *Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) ("alienage is a jurisdictional fact; and . . . an order of deportation must be predicated upon a finding of that fact; [and] the burden of proving alienage rests upon the government"); *Woodby v. I.N.S.*, 385 U.S. 276, 277 (1966) (the government "must establish the facts supporting deportability by clear, unequivocal, and convincing evidence"). In short, where a habeas petitioner such as Mr. Padilla makes out a *prima facie* case of a constitutional deprivation without a hearing, the burden of proof properly rests with the Executive to establish the jurisdictional fact that (as is assumed in this brief) would entitle it to detain Mr. Padilla: the alleged fact that he is an enemy combatant.

B. The Standard of Proof that the Executive Must Satisfy is Clear and Convincing Evidence

In many ways, the detention of Mr. Padilla is no different than that of a convicted criminal. Indeed, given the indefinite nature of his confinement, his inability to communicate with anyone, the refusal to accord him the rights of a prisoner of war under the Geneva Convention, and his lack of access to counsel, Mr. Padilla is worse off than incarcerated convicted criminals. Nevertheless, if the Executive has the power to detain an enemy combatant at all, it can only be because such a person falls within the small category of those who can

lawfully be detained even without a criminal conviction. *Zadvydas*, 533 U.S. at 689. In those cases, the Court heretofore has consistently ruled that detention is lawful only upon clear and convincing proof of the factual basis for detention.[11] *Salerno*, 481 U.S. at 751; *Sandosky v. Kramer*, 455 U.S. 745, 769-70 (1982); *Addington v. Texas*, 441 U.S. 418 (1979).

For example, the Bail Reform Act of 1984, which this Court reviewed in *Salerno*, permits the pre-trial detention of an arrestee pending trial on a showing of clear and convincing evidence of dangerousness. The Court held that because of the safeguards built into the Act, it survived a facial challenge to its constitutionality. Those procedural protections include that the government show probable cause that the arrestee presents a danger to society and that a full-blown adversary hearing is held before a federal court. In that adversary hearing, the arrestee has the right to counsel, the right to testify, and the right to challenge the government's witnesses. "When the government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat." *Id.* at 751.

By contrast, here Congress has not legislated the standards or procedures pursuant to which the Executive may detain a putative enemy combatant. *Salerno* strongly suggests, however, that to support any form of detention other than as a result of a criminal conviction, the Constitution requires nothing less than the procedures legislated under

11. This brief focuses on Mr. Padilla's due process rights, and has not explored the implications of a determination that his detention is punitive and therefore de facto a criminal proceeding. If the detention of Mr. Padilla is viewed as tantamount to punishment for criminal acts, see footnote 8 *supra*, then proof beyond a reasonable doubt would be required. *In re Winship*, 397 U.S. 358, 364 (1970).

the Bail Reform Act, including requiring the government to prove "an identified and articulable threat" and to do so by clear and convincing evidence. *Id.* That conclusion is consistent with *Addington*, where this Court held that the Due Process Clause requires that the state justify the civil confinement of a mentally ill person with clear and convincing proof. 441 U.S. at 432. Similarly, in *Sandosky*, this Court held that because of the significant interests at stake and because of the sizable social cost of even occasional error, due process requires that parental rights may be terminated permanently only upon a showing, at a minimum, of clear and convincing evidence. 455 U.S. at 769-70.

C. The "Some Evidence" Standard is Insufficient

The district court ruled that Mr. Padilla would be entitled to contest the allegations brought against him, but that the court would "examine only whether the President had some evidence to support his finding that Mr. Padilla was an enemy combatant." *Padilla*, 233 F. Supp. 2d at 610.[12] If, as amici believe, the clear and convincing standard is constitutionally required, the far more deferential "some evidence" standard is not acceptable. In any event, considered on its own terms, there are several additional reasons why that standard is not the correct one.

12. It is unclear what that standard requires a court to do. Chief Judge Mukasey believed that the "some evidence" standard implied some opportunity for the detainee to attack the evidence proffered by the government, and to offer evidence of his own. *See Padilla*, 243 F. Supp. 2d at 56. Yet, the Executive has now taken the position that the "some evidence" standard, if applicable at all to military detentions in the "war on terror," would require uncritical acceptance by the court of the government's evidence and would not under any circumstances require "evidentiary proceedings." Brief for the Respondents, *Hamdi v. Rumsfeld*, No. 03-6696 (filed March 29, 2004), at 34-36. Although the district court's version of the standard is obviously closer to what the Due Process Clause requires, it still cannot be squared with this Court's holdings in *Salerno*, *Sandosky*, and *Addington*.

First, it cannot apply to jurisdictional facts essential to establish the Executive's power to exact a deprivation of an individual's liberty. For example, the Court has consistently distinguished between the Executive's determination to exercise its right to exclude or deport an alien, to which it applied the deferential "some evidence" standard of review, and the Executive's determination of the "jurisdictional fact" of alienage, *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 133 (1924). The fact of alienage is one that a petitioner is entitled to challenge through a *de novo* judicial hearing of the evidence. *Ng Fung Ho*, 259 U.S. at 284-85.

Second, as the district court below conceded, *Padilla*, 243 F. Supp. 2d at 54, "some evidence" has never been used as a standard for judicial determination of the validity of allegations of fact by a prosecutorial authority, as opposed to judicial review of findings of fact previously made by a competent tribunal. *See, e.g., Superintendent v. Hill*, 472 U.S. 445 (1985). *Hill* approved the "some evidence" standard in review of the record of completed disciplinary proceedings, in which an inmate "must receive (1) advance written notice of the disciplinary charges; (2) an opportunity . . . to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action." *Id.* at 454. Because the facts said to justify Mr. Padilla's detention have not previously been found in any proceeding having even the minimal safeguards afforded to the inmates in *Hill*, and because the protected liberty interest for Mr. Padilla is of the highest order, the "some evidence" standard of review cannot withstand scrutiny as sufficient to meet due process requirements.

Third, the deferential "some evidence" standard would undermine the unique role of the federal courts and the writ of habeas corpus as the ultimate legal protection against Executive overreaching. The Court is respectfully referred

to the amicus brief filed by substantially all of the present amici in *Hamdi v. Rumsfeld*, in which the historical role of habeas corpus and its central place in the constitutional system of separation of powers is discussed. Brief of Amicus Curiae Nathaniel R. Jones et al., *Hamdi v. Rumsfeld*, No. 03-6696 (filed February 23, 2004).

CONCLUSION

Reflecting on one of our nation's most trying crises, the Court in *Ex parte Milligan*, 71 U.S. at 120-21, observed that ours is a Constitution for both times of peace and times of war. Speaking 80 years later, Justice Murphy stated,

> From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised. . . . Constitutional rights are rooted deeper than the wishes and desires of the military.

Duncan, 327 U.S. at 330, 332 (Murphy, J., concurring). If the Court determines that the Executive is empowered to detain an enemy combatant, it should declare that such power must be limited by the procedural due process requirements

of notice and the right to be heard, access to counsel, and application of the proper standard of clear and convincing proof.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DONALD RUMSFELD, Secretary of Defense,

Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN,
as next friend of JOSE PADILLA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT OF INTEREST[1]

This case raises the question whether the President can seize a U.S. citizen in the United States and detain him indefinitely by declaring him an "enemy combatant." *Amici curiae* are professors who teach criminal law or criminal procedure at law schools in the United States and who have a particular interest in habeas corpus law. The group of *amici* includes authors of leading texts and articles on habeas corpus. *Amici* do not contend that Founding-era history should be dispositive in the interpretation of the Constitution's Suspension Clause. The professional interest of *amici curiae* is in ensuring that this Court is completely and accurately informed about the precedents, understanding, and evidence regarding the writ of habeas corpus that, under this Court's precedents, are appropriately considered in examining the issues raised under the Suspension Clause and statutory codification of the writ. In their writing and teaching, *amici curiae* have frequently described the writ's historic role in safeguarding prisoners' constitutional rights and its importance as a post-conviction remedy. *Amici curiae* submit the within brief because this case implicates a function of the writ so basic that, at least until now, it has long been taken for granted: to prevent indefinite detention without trial.

SUMMARY OF ARGUMENT

In May, 2002, Jose Padilla, a U.S. citizen, was arrested at a Chicago airport pursuant to a material witness warrant; the following month, he was designated an "enemy combatant" by the President and transported to a naval brig in Charleston, South Carolina, where he remains confined today. In his brief to this Court, the Solicitor General maintains that the President, as Commander-in-Chief in time of war, has the authority to seize an individual, including a U.S. citizen, anywhere in the United

1. Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, or their counsel, made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

States, designate him an "enemy combatant," and confine him indefinitely as a "simple war measure,"[2] without trial or any other meaningful opportunity to challenge the allegations against him. The Solicitor General further maintains that such sweeping executive detention power requires no specific authorization from Congress[3] and permits no "second-guess[ing]" by the Judiciary.[4]

These assertions represent a marked departure from centuries-old principles of individual liberty and the separation of powers embodied in the writ of habeas corpus and the Suspension Clause of the U.S. Constitution. In the United States, habeas corpus has provided an effective remedy for those whom "the government, through restraints, has separated from their rights under the fundamental Law of the Land."[5] Historically, courts enforced the writ's protections by guaranteeing prisoners the right to contest the allegations against them at trial and preventing confinement by executive fiat, even of suspected enemies of state.

The writ's protections applied even in time of war, and could not be trumped by executive assertions of a "war power." Indeed, the safeguards of habeas corpus were forged amid foreign invasions and internal strife in response to claims of an executive prerogative to dispense with common law process. The Anglo-American tradition permitted only two narrow exceptions: suspension of the writ by the legislative body or the imposition of martial law where the civil order had broken down and the courts rendered incapable of dispensing justice. Neither applies here. Instead, the Solicitor General concedes the writ is "available," but seeks to deprive it of all its historic force and meaning.

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2. Br. for the Pet'r at 29 (internal quotations and citation omitted).

3. *Id.* at 42.

4. Br. of Resp't-Appellant to the U.S. Court of Appeals for the Second Circuit at 47 (internal quotation marks and citation omitted).

5. Randy Hertz & James S. Liebman, 1 *Federal Habeas Corpus Practice and Procedure* § 2.3, at 23 (4th ed. 2001).

1. In England, habeas corpus provided an effective remedy against unlawful detention by guaranteeing the basic protections of due process which date to the Magna Carta. By the time of the celebrated Habeas Corpus Act of 1679, the writ provided that those arrested in England for suspected wrongdoing, even if designated a threat to national security by the king himself, could not be imprisoned indefinitely but had to be charged and tried at common law. Unless Parliament suspended the writ, the protections of habeas corpus remained in place. At the same time, Parliament placed the military under its firm control and curtailed its jurisdiction, thus ensuring that the protections of due process, secured by habeas corpus, would not be swallowed up by broad assertions of military power by the executive.

2. The Framers, steeped in the writings of preeminent common law jurists like Coke and Blackstone, understood the writ's central role in safeguarding individual liberty. They foresaw the potential need for emergency detention, but, keenly aware of its dangers, restricted it to the narrow circumstances set forth in the Suspension Clause and gave Congress the exclusive authority to suspend the writ. The protections of habeas corpus were never subordinated to a president's claim of military power. Faced with real threats to their new republic's survival, including the War of 1812, the only foreign war ever fought principally on U.S. soil, the Founding generation never sacrificed the writ's core protections or abandoned the rule of law.

ARGUMENT

I. Indefinite Executive Detention Contravenes Long Established Principles Of Habeas Corpus Law And The English Legal Tradition

A. Habeas Corpus Prevented Indefinite Detention Absent Suspension of the Writ by Parliament.

As this Court has repeatedly recognized, habeas corpus historically provided a remedy against unlawful executive detention, and "it is in this context that its protections have been

strongest."[6] Since the late 1500s, the writ has been used by prisoners of state seeking discharge from executive confinement.[7] The king's assertion of a prerogative to detain in circumvention of due process was first squarely challenged in *Darnel's Case*,[8] a landmark decision[9] that led to the establishment of habeas corpus as the foremost protection against indefinite executive detention. In the throes of a war against France and Spain, King Charles I had detained numerous individuals for refusing to contribute to his attempt to raise revenue for the military campaign. No charges were filed, and the individuals sought writs of habeas corpus claiming their imprisonment was unlawful and demanding release on bail. Without more specific charges, they argued, "imprisonment shall not continue for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually"[10] in

6. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *see also Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in the result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention."); *cf.* Daniel J. Meador, *Habeas Corpus and Magna Carta: Dualism of Power and Liberty* 38 (1966) ("Detention by executive authority . . . poses the oldest and perhaps greatest threat to liberty under law.").

7. *Howel's Case*, 74 Eng. Rep. 66 (C.P. 1587) (discharging prisoner for insufficient cause stated in return); *Peter's Case*, 74 Eng. Rep. 628 (C.P. 1586) (same); R.J. Sharpe, *The Law of Habeas Corpus* 7 (1976) (by late 1500s, habeas corpus "shown to be a remedy fit to challenge the authority of the crown"); *see generally* J.H. Baker, 6 *The Oxford History of the Laws of England* 94 (2003) (writ provided "an effective means of curbing arbitrary power" by crown officials).

8. 3 How. St. Tr. 1 (K.B. 1627).

9. *Id.* at 31 (Doderidge, J.) (case was "the greatest cause that I ever knew in this court"); Meador, *supra*, at 13 (case directly raised issue of executive's prerogative to deprive an individual of his liberty and thus "posed one of the great constitutional issues of all time").

10. *Darnel's Case*, 3 How. St. Tr. at 8.

violation of the Magna Carta.[11] The Attorney General responded that it was the king's prerogative to imprison by his "special command" for "a matter of state . . . not ripe nor timely" for the ordinary common law process of formal accusation and trial.[12] He emphasized the crown's overriding interest in protecting "a conspiracy-threatened commonwealth"[13] and insisted that judges defer to the king's judgment.[14]

When the court denied relief, Parliament responded with the Petition of Right, prohibiting imprisonment upon royal command and without formal charges.[15] The Petition made clear that responsible government could not coexist with sweeping executive claims to emergency powers of detention and arrest.[16] The king, however, continued to detain individuals without specifying any charge for which they could be tried, thus preventing them from testing the allegations against them.[17] Parliament, in turn, enacted the Habeas Corpus Act of 1641,[18] which required courts to issue writs of habeas corpus on behalf of prisoners "without delay."[19] The act commanded custodians to provide a legal basis for a prisoner's detention and instructed

11. Magna Carta art. 39 (1215) ("No freeman shall be taken or imprisoned . . . except by the lawful judgment of his peers or by the law of the land.").

12. *Darnel's Case*, 3 How. St. Tr. at 37 (arguments of Attorney General Robert Heath).

13. Robert S. Walker, *The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty* 67 (1960).

14. *Darnel's Case*, 3 How. St. Tr. at 45.

15. 3 Car. 1, c. 1, §§ 5, 10 (1628).

16. William F. Duker, *A Constitutional History of Habeas Corpus* 141 (1980).

17. *Six Members' Case*, 3 How. St. Tr. 235, 240 (K.B. 1629) (imprisoning "for notable contempts . . . against our self and our government, and for stirring up sedition against us"); Duker, *supra*, at 45 (*Six Members' Case* shows "how easily the King could follow the letter of the Petition while debasing its spirit entirely").

18. 16 Car. 1, c. 10 (1641).

19. *Id.* § 6.

judges to act promptly by discharging, bailing, or remanding the prisoner for trial.[20] The act also abolished the infamous Court of the Star Chamber, which had previously been a source of "arbitrary power and government."[21]

The most crucial blow against indefinite executive detention came with the Habeas Corpus Act of 1679,[22] which made the writ "the most effective weapon yet devised for the protection of the liberty of the subject."[23] The act remedied various procedural flaws in the common law writ to ensure a prompt judicial inquiry into the legality of confinement and prevented detainees from languishing in prison without common law process.[24] Even for those detained on the most serious allegations, charges had to be "plainly and specially" stated in the warrant of commitment,[25] and the prisoner released if not tried within a short period of time.[26] Blackstone praised the 1679 Act as a "second magna carta and stable bulwark of our liberties"[27] precisely because it categorically precluded evasion of the most elementary principle of due process in the common law tradition — continued confinement without opportunity to

20. *Id.*; Dallin H. Oaks, "Legal History in the High Court—Habeas Corpus," 64 *Mich. L. Rev.* 451, 460 (1966) (1641 act firmly established habeas corpus as "effective remedy for executive detention not based on common-law process").

21. 16 Car. 1, c. 10, §§ 2-3.

22. 31 Car. 2, c. 2 (1679).

23. 9 William S. Holdsworth, *A History of English Law* 118 (1926).

24. *E.g.*, 31 Car. 2, c. 2, § 3 (providing for issuance of writ during "the [v]acation," when common law courts were not in session); *id.* §§ 11-12 (prohibiting jailors from moving prisoners to avoid writ); *id.* §§ 2, 5 (penalizing jailors for not promptly producing prisoner and basis for detention in court); *see generally* Sharpe, *supra*, at 18-19.

25. 31 Car. 2, c. 2., §§ 2, 7

26. *Id.* § 7 (prisoner committed on charge of high treason or felony must be indicted within one term or session after commitment or bailed, and tried within two terms or sessions or discharged); *see also* Sharpe, *supra*, at 133 ("From the seventeenth century to the present, judges have considered this section to the very hub of the design of the [1679 act].").

27. 1 William Blackstone, *Commentaries* *137.

contest the state's allegations.[28] Indefinite detention was effectively abolished, even for supposed enemies of state.[29] As Edward Coke made clear, prolonged detention without "full and speedy justice" was contrary to the basic laws and customs of England.[30] Thus, even a body of foreign anarchists, suspected of a plot to blow up the Houses of Parliament, would be entitled to release on habeas unless promptly charged and tried.[31]

After the passage of the 1679 act, temporary suspension of the writ by Parliament became the only lawful means to indefinitely detain an individual in England suspected of wrongdoing.[32] Parliament passed the first suspension acts amid armed conflict abroad and fears of exiled King James II's attempts to regain the throne after the Glorious Revolution of 1688.[33] Other suspension acts followed during the next century to preserve the safety of the realm in time of danger and war by authorizing the detention of suspected enemies of state without common law process.[34] These acts increased the period of time

28. *E.g.*, Rollin C. Hurd, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus* 266 (2d ed. 1876) ("It was the hateful oppressiveness of long and close confinement, and not the dread of a trial by his peers, which made the suffering prisoner of state exclaim: 'The writ of habeas corpus is the water of life to revive from the death of imprisonment.'") (emphases omitted).

29. *E.g.*, *Crosby's Case*, 88 Eng. Rep. 1167, 1168 (K.B. 1694) (Holt, C.J.) ("The design of the [1679] Act was to prevent a man's lying [indefinitely] under an accusation for treason.").

30. Edward Coke, *The Second Part of the Institutes of the Laws of England* 43 (1817 ed.).

31. Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* 222-23 (1908).

32. *E.g.*, 1 William Blackstone, *Commentaries* *136.

33. 7 & 8 Will. 3, c. 11 (1698) (suspension to "secur[e] the Peace of the Kingdom in this Time of imminent Danger, against all Attempts and traitorous Conspiracies of evil disposed Persons"); 1 Will. & Mary, c. 7 (1688).

34. *E.g.*, 38 Geo. 3, c. 36 (1798) (suspension to protect king and "secur[e] the Peace and Laws and Liberties of this Kingdom," where

(Cont'd)

such individuals could be confined, in effect suspending not habeas corpus itself but rather the principal right secured by the writ — to test the allegations at trial or be released.[35] Suspension acts all contained an express expiration date,[36] usually a year or less from the act's passage.[37] Those not specifically within a suspension act continued to enjoy the benefits of due process secured by the writ and the 1679 statute.[38] And, even when Parliament had suspended the writ, a detainee could still apply for habeas corpus to determine whether he had been committed on a sufficient warrant.[39] If so, the petition would be denied and the prisoner remanded to custody since the judicial process ordinarily secured by the writ had been suspended for such persons.[40] Thus, suspension gave "[e]xtreme powers . . . to the executive, but powers nonetheless distinctly limited by law."[41]

In short, the writ's history in England demonstrates the increasingly well established relationship between habeas corpus

(Cont'd)

"his Majesty's Enemies are making Preparations with considerable and increasing Activity for the Invasion of his Majesty's Dominions"); 19 Geo. 2, c. 1 (1746) (suspension to secure peace and security of kingdom from threatened rebellion in Scotland, aided by enemies abroad); 17 Geo. 2, c. 6 (1744) (suspension to protect against danger of foreign invasion by those acting "in concert with disaffected persons in England"); *see generally* William Forsyth, *Cases and Opinions on Constitutional Law* 452 (1869) (citing suspension acts).

35. Sharpe, *supra* at 92; Duker, *supra*, at 142.

36. Sharpe, *supra*, at 92 n.1.

37. *Id.* at 92; Dicey, *supra*, at 226; *see also* 38 Geo. 3, c. 36, § 1 (1798) (nine-month suspension).

38. Sharpe, *supra*, at 92.

39. Duker, *supra*, at 142 & n.120; *see also R. v. Earl of Orrery*, 88 Eng. Rep. 75, 77 (K.B. 1722) (acknowledgment by king's counsel that courts may still inquire whether prisoner falls within suspension act).

40. *R. v. Despard*, 101 Eng. Rep. 1226, 1227 (K.B. 1798) (denying government's motion to quash writ based on assertion that detention fell within suspension act); Duker, *supra*, at 142.

41. Sharpe, *supra*, at 92.

and the executive's emergency detention power. Absent suspension of the writ by Parliament, the core principles of the English common law remained in force, even for those believed by the king to pose a danger to the State.

B. The Supremacy of the Civilian Authority over the Military Ensured the Protections of Habeas Corpus

In England, the safeguards of habeas corpus could not be subordinated to military power based on executive fiat. Even during war, as long as the courts were open and capable of dispensing justice, suspension of the writ by Parliament remained the only lawful way to confine someone in England suspected of wrongdoing without the established protections of due process.

With the Petition of Right of 1628, Parliament subjected the military to its control and curtailed its jurisdiction. The Petition denounced Charles I's expansive use of military commissions during periods of strife, which had led to the execution of both soldiers and civilians for crimes under a system of justice unknown to the common law.[42] It declared these commissions unlawful,[43] and asserted that the king must instead proceed against alleged offenses and threats to the realm "by the laws and statutes of the land."[44] Like the king's detention of prisoners without charges in *Darnel's Case*,[45] his use of military commissions in England violated the Magna Carta's guarantee that no one would be punished or otherwise deprived of his liberty without due process. In 1689, the Bill of Rights[46]

42. Charles M. Clode, *The Administration of Justice under Military and Martial Law* 21 (1872) (such use of martial law "was a direct violation of the fundamental Laws of the Land"); *see also* Charles Fairman, *The Law of Martial Rule* 9 (1930) (king's use of martial law "precipitated a constitutional crisis").

43. 3 Car. 1, c.1, §§ 7-10 (1628).

44. *Id.* § 8.

45. 3 How. St. Tr. 1 (1627).

46. 1 Will. & Mary, c. 2 (1689) (prohibiting king, without consent of Parliament, from keeping standing army within kingdom in time of peace and from "suspending the laws or the execution of laws by regal authority").

and Mutiny Act[47] both further limited royal power and enshrined these principles in English law.

In the eyes of England's leading jurists, military law (or martial law, as it was sometimes also known) was something "built upon no settled principles," "entirely arbitrary in its decisions," and "in truth and reality no law" at all.[48] In England, military jurisdiction was restricted to offenses by soldiers[49] and justified as a means to maintain discipline within the ranks.[50] The use of military law in England was otherwise forbidden in time of peace, and, even in time of war, except when the common law courts were closed and one could not receive justice "according to the Laws of the Land."[51] Those who owed a duty

47. 1 Will. & Mary, c. 5, preamble (1689) ("[N]o Man may be forejudged of Life or Limb or subjected to any kind of punishment by Martial Law, or in any other Manner than by the Judgment of his Peers and according to the known and Established Laws of this Realm."), *reprinted in* William Winthrop, *Military Law and Precedents* 929 (2d ed. 1920); *see also* Robert D. Duke & Howard S. Vogel, "The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction," 13 *Vanderbilt L. Rev.* 435, 444 (1960) (Mutiny Act provided "ringing declaration of the supremacy of civil procedures over military law").

48. 1 William Blackstone, *Commentaries* *413; *see also* Matthew Hale, *The History of the Common Law of England* 26 (1755) (Charles M. Gray ed. 1971) (martial law "something indulged rather than allowed as a Law").

49. *E.g.*, Mutiny Act, 1 Will. & Mary, c. 5, preamble (1689) (providing for court-martial of soldiers who commit mutiny, sedition, or desertion); *see also* Duke & Vogel, *supra*, at 445 ("[T]he British articles of war in effect at the outbreak of the American Revolution reflect the plain purpose to confine the scope of courts-martial jurisdiction to the trial and punishment of military offenses, and in other respects to give precedence to the civil authorities.").

50. *E.g.*, 1 William Blackstone, *Commentaries* *413 (military law for "due regulation and discipline of the soldiery").

51. Hale, *supra*, at 27; *see also* 1 William Blackstone, *Commentaries* *414; 1 William S. Holdsworth, *A History of English Law* 339 (1903) ("It was . . . clearly settled that it was not a time of war

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of allegiance and were suspected of acts endangering the king or safety of the realm were traditionally prosecuted for treason,[52] an offense that had encompassed the commission of war-like acts by enemies of state since the fourteenth century.[53]

With these principles firmly established, the king was stripped of the authority to suspend the established laws of the realm at will, and the guarantee of due process, secured by habeas corpus, became firmly established as the cornerstone of the Anglo-American legal tradition.

(Cont'd)

unless the king's courts were shut up, or unless the sheriff could not execute the king's writ."); Fairman, *supra* at 17 ("'When the Courts are open, Martial-Law cannot be Executed.'") (quoting Edward Coke) (citation omitted); *cf. Wolfe Tone's Case*, 27 How. St. Tr. 614, 625-26 (Irish K.B. 1798) (issuing writ and suspending execution of death sentence over military's objection when father, as "next friend," claimed Tone was never member of armed forces and thus not subject to court-martial); Dicey, *supra*, at 289 (Tone's case demonstrates judges' resolve to "maintain[] the rule of regular law, even at periods of revolutionary violence").

52. *E.g.*, *Downie's Case*, 24 How. St. Tr. 1 (1794) (treason conviction for procuring weapons and for conspiring to seize castle of Edinburgh and attack king's forces); *Layer's Case*, 16 How. St. Tr. 93 (K.B. 1722) (treason conviction for plotting to take up arms against king); *Vaughan's Case*, 13 How. St. Tr. 485 (K.B. 1696) (treason conviction for cruising on French ship with intent to take English ships); *Parkyns' Case*, 13 How. St. Tr. 63 (K.B. 1696) (treason conviction for caching arms and obtaining horses for attempt to assassinate King William and wage war to restore exiled King James II to power); *Harding's Case*, 86 Eng. Rep. 461 (K.B. 1690) (treason conviction for hiring men to assist French in waging war against king and queen).

53. Statute of Treasons, 25 Edw. 3, c. 2 (1350) (treason to "levy war against . . . the King in his realm, or be adherent to the enemies [of the King] in the realm, giving to them aid and support in his realm or elsewhere"), *quoted in* Willard Hurst, "Treason in the United States," 58 *Harv. L. Rev.* 226, 226 n.1 (1944).

C. Habeas Corpus Ensured Meaningful Review for Individuals in Military Custody

For those detained by the executive in England on suspicion of wrongdoing, habeas corpus ensured the right to test the state's allegations at trial.[54] For those confined in "noncriminal" matters, and thus outside the safeguards of the 1679 act,[55] the habeas proceeding itself provided the only "effectual remedy" against unlawful restraint.[56] In such instances, judicial review was broader,[57] and individuals could contest the factual basis for their confinement at common law,[58] a right secured by statute in 1816.[59]

Military detention was no exception. In those circumstances where the military could properly exercise authority, the writ remained available when it exceeded those limits and thus afforded a remedy to "any one placed under Military arrest which

54. *E.g.*, Hurd, *supra*, at 266.

55. 31 Car. 2, c. 2, § 2 (act applied only to those detained for "criminal or supposed criminal matters").

56. Hurd, *supra*, at 271; *see also* 6 *Encyclopedia of the Laws of England* 132 (A. Wood Renton ed. 1898) (those not included within 1679 act still protected by common law writ).

57. *Cf. Bushell's Case*, 124 Eng. Rep. 1006, 1010 (C.P. 1670) (Vaughan, C.J.) (return to habeas corpus insufficient because it lacked "full" and "manifest" evidence necessary to sustain commitment for contempt, as prisoners would never have opportunity to contest allegations at trial, in contrast to commitment for felony).

58. *E.g.*, *R. v. Turlington*, 97 Eng. Rep. 741 (K.B. 1761) (commitment for insanity); *R. v. Lee*, 83 Eng. Rep. 482 (K.B. 1676) (imprisonment of wife by husband); Oaks, "Legal History in the High Court," *supra*, at 454 n.20 (instances in which individuals could contradict facts in return too numerous to specify); *see also* Jonathan L. Hafetz, Note, "The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts," 107 *Yale L.J.* 2509, 2535 (1998) (common law judges' responses to questions of House of Lords on proposed 1758 bill to provide for review of facts in cases outside 1679 act show nearly all those judges either rejected they were bound by facts in return or believed such facts could be contested as practical matter).

59. 56 Geo. 3, c. 100. §§ 3-4 (1816).

he deems to be unlawful,"[60] even during wartime. The crown's assertion that an individual's detention was a military matter did not itself provide a sufficient justification.

First, even those seized and detained by the military as alleged prisoners of war could seek review on habeas of the jurisdictional facts underlying their "enemy" status.[61] Although courts would not discharge those ultimately found to be prisoners of war, they still could examine whether such persons were "improperly detained," either as a matter of fact or law, and grant relief accordingly.[62]

British soldiers confined without process likewise sought review on habeas. In *Wade's Case*,[63] the court considered a habeas petition filed on behalf of a sergeant claiming his continued detention for alleged desertion violated a provision of the articles of war requiring trial by court-martial "within eight days, or as soon after as a court martial can be held."[64] Lord Mansfield commanded the military to show cause for Wade's detention, and the prisoner was subsequently tried for

60. Clode, *supra*, at 98; *see also* Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 *Harv. L. Rev.* 441, 475 (1963) ("the classical function of habeas corpus was to assure the liberty of subjects against detention by the executive or *the military* without any court process at all") (emphasis added).

61. *Three Spanish Sailors' Case*, 96 Eng. Rep. 775, 776 (C.P. 1779) (prisoners not entitled to discharge because, based "upon their own showing," they are prisoners of war); *R. v. Schiever*, 97 Eng. Rep. 551, 552 (K.B. 1759) (denying relief on merits after reviewing petition to confirm petitioner's prisoner of war status).

62. Sharpe, *supra*, at 113; *see generally* William S. Church, *A Treatise on the Writ of Habeas Corpus* § 222, at 311 (2d ed. 1893) ("The question of jurisdiction . . . is always open and may be inquired into upon proceedings by habeas corpus.").

63. This case, decided by the King's Bench on January 28, 1784, is reported in *Blake's Case*, 105 Eng. Rep. 440, 441 n.(a)[1] (K.B. 1814).

64. *Id.*

his alleged offense.[65] Construing the same provision again in *Blake's Case*,[66] the court refused to dismiss the habeas petition based on the military's mere assertion that a court-martial could not conveniently be assembled because relevant witnesses were unavailable and because Blake's regiment was still engaged in foreign service.[67] The court ultimately denied relief, but only after affording Blake an opportunity to contest the military's claims[68] and determining that the delay was "satisfactorily explained."[69]

Habeas also provided a remedy for the unlawful impressment — or forcible seizure for naval service — of sailors during war, a practice that closely concerned assertions of executive prerogative.[70] In *Goldswain's Case*,[71] for example, the court entertained a habeas petition brought on behalf of an impressed sailor. Despite the official's assertion "of urgent necessity" in time of war, the judges refused to "shut their eyes" to the facts asserted by the applicant, which suggested that the admiralty lacked lawful authority over the impressed sailor,[72] and ordered his release.[73] Similarly, in *R. v. White*,[74] the court granted relief to an impressed seaman who had "no other

65. *Id.* Although the reported version of the case does not describe the proceedings on the return, it suggests the writ's role in ensuring military officials remained within prescribed bounds when applying military law. *Id.*

66. 105 Eng. Rep. 440 (K.B. 1814).

67. *Id.* at 441.

68. *Id.* at 442 (Ellenborough, C.J.) (prisoner failed to show "something . . . to the contrary" of what military had asserted as basis for his continued detention without trial).

69. *Id.* at 441.

70. Dicey, *supra*, at 219.

71. 96 Eng. Rep. 711 (C.P. 1778).

72. *Id.* at 712.

73. *Id.* at 713 (impressed sailor initially released on own recognizance and subsequently discharged with consent of board of admiralty).

74. 20 How. St. Tr. 1376 (K.B. 1746).

reviewing the factual assertions on both sides and finding the military lacked authority over him.[75]

In sum, habeas corpus traditionally ensured that individuals in England could not be confined on mere executive say-so. The crown's assertions of military power did not abridge this principle, and the writ provided an important remedy to those unlawfully in military custody even during wartime.

II. The Founding Generation Ensured The Writ's Protections Against Indefinite Detention Through The Suspension Clause And The Supremacy Of Civilian Rule

A. In Colonial America and under the United States Constitution, Habeas Corpus Provided the Ultimate Safeguard against Indefinite Detention.

The writ's history in colonial America and during the Founding era demonstrates that habeas corpus was understood as providing the same elementary check against unlawful executive detention as it had in England. Since the early colonial period, the writ has held a uniquely elevated place in American law.[76] Deeply influenced by the writings of eminent English jurists like Coke and Blackstone, the colonists viewed habeas corpus as the preeminent safeguard of due process, the

75. *Id.* at 1377; *see generally* Hurd, *supra*, at 268 (in such cases where habeas proceeding was "first judicial hearing . . . upon the questions involved," there was "if not a clear necessity . . . at least a peculiar fitness in admitting evidence of all the facts important to be known to enable the court to determine whether the imprisonment was illegal").

76. *E.g.*, Francis Paschal, "The Constitution and Habeas Corpus," 1970 *Duke L.J.* 605, 608 ("abundant evidence of an early and persisting attachment" to habeas corpus in colonial America); Milton Cantor, "The Writ of Habeas Corpus: Early American Origins and Development," *in Freedom and Reform: Essays in Honor of Henry Steele Commager* 55, 74 (H. Hyman & L. Levy eds. 1967) ("Habeas corpus was the only common-law process explicitly written into the Constitution, which is the most complete measure of its reception by the colonists and the high regard in which it was held.").

fundamental guarantee of English law derived from the Magna Carta.[77] The common law writ operated in all thirteen British colonies that rebelled in 1776,[78] and in practice judges often employed the remedial protections of the 1679 Habeas Corpus Act "as a matter of course."[79]

At the same time, however, the failure to extend the 1679 act uniformly throughout the colonies led to abuses by royal officials, especially where their authority was directly challenged.[80] As Alexander Hamilton made clear, it was precisely the act's protection against the supreme example of arbitrary government — imprisonment without formal accusation and trial[81] — that had made the writ "'the bulwark

77. Meador, *supra*, at 24; *see also* Larry W. Yackle, *Postconviction Remedies* § 4, at 7 (1981) (writ became "inextricably bound up with the Great Charter").

78. Duker, *supra*, at 115; A.H. Carpenter, "Habeas Corpus in the Colonies," 8 *Am. Hist. Rev.* 18, 21, 26 (1902).

79. Zechariah Chafee, Jr., "The Most Important Right in the Constitution," 32 *B.U.L. Rev.* 143, 146 (1952).

80. *E.g.*, Alan Clarke, "Habeas Corpus: The Historical Debate," 14 *N.Y.L. Sch. J. Hum. Rts.* 375, 393 (1998) (absent protections of 1679 act, colonists remained subject to "arbitrary detention" by royal governors and other executive officials); Duker, *supra*, at 101-03 (abuses by crown officials in Massachusetts). The colonists addressed these deficiencies after declaring independence from England. *E.g.*, Mass. Const. pt. 2, c. 6, art. VII (1780) ("The privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this commonwealth, in the most free, easy, cheap, expeditious, and ample manner; and shall be not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months."); Duker, *supra*, at 111 (New York's enactment in 1789 of habeas corpus statute modeled on 1679 act ensured effective protections lacking under common law writ).

81. *The Federalist* 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("'To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.'") (quoting 1 William Blackstone, *Commentaries* *136).

of the British Constitution.'"[82] The king's abuse of his detention power was one of the grievances listed in the Declaration of Independence,[83] and reinforced the Founding generation's determination to ensure that the writ provide a secure guarantee of due process and the rule of law in their own new republic.[84] Indeed, the grant of habeas jurisdiction in the First Judiciary Act of 1789[85] pre-dated the Bill of Rights, and the answer made to the claim that the Constitution lacked a bill of rights was that the clauses guaranteeing habeas corpus and jury trial served that essential purpose because of their ever-present power to protect all other rights.[86]

Thus, the only debate over the habeas corpus clause at the Federal Convention of 1787 centered on whether there should be any authority to suspend the writ at all and, if so, how narrow that suspension power should be.[87] The proposals reflected the Framers' concerns about the writ's frequent suspension in

82. *Id.* (quoting 4 William Blackstone, *Commentaries* *438).

83. *The Declaration of Independence* para. 20 (1776) (frequent deprivation of benefits of trial by jury).

84. Akhil Reed Amar, "Sixth Amendment First Principles," 84 *Geo. L.J.* 641, 663 (1996) ("[The 1679 act] stood alongside Magna Charta and the English Bill of Rights of 1689 as a towering common law lighthouse of liberty — a beacon by which framing lawyers in America consciously steered their course.").

85. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82 (granting federal courts power to issue writs on behalf of prisoners "in custody, under or by colour of the authority of the United States"). The present version of the habeas corpus provision of the 1789 act is codified at 28 U.S.C. § 2241(a).

86. *E.g.*, *The Federalist* 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

87. Paschal, *supra*, at 608 ("[I]n the Philadelphia Convention and in the struggle for ratification, there was never the slightest objection to according a special preeminence to the Great Writ."); *see also* Gerald L. Neuman, "Habeas Corpus and the Suspension Clause after INS v. St. Cyr," 33 *Colum. Hum. Rights L. Rev.* 555, 566 (2002) ("The records make clear that restricting Congress's power to suspend was not controversial. . . .").

England, where there was no express limitation on Parliament's power to suspend habeas corpus.[88] An early proposal stated that the writ shall not be suspended except "on the most urgent occasions, and then only for a limited time not exceeding twelve months."[89] This language was ultimately rejected in favor of the stricter restriction contained in the Suspension Clause, which forbids suspension outside of two circumstances — "Rebellion or Invasion" — both of which necessarily involve armed conflict and armed enemies within the United States.[90] Adopted with little debate,[91] the Suspension Clause represents the sole express

88: Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 214 (5th ed. 1891) ("[I]t has frequently happened in foreign countries, and even in England, that the writ has upon various pretexts and occasions been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design . . . ."); *see also* Leonard W. Levy, *Origins of the Bill of Rights* 66 (1999) (noting Thomas Jefferson's warning that suspension power had been abused in England and invoked for both "real and sham" plots).

89. 2 *The Records of the Federal Convention of 1787*, at 438 (Max Farrand ed. 1966) (proposal of Charles Pinckney); *see also id.* (proposal to declare writ of habeas corpus "inviolable") (proposal of John Rutledge).

90. Art. 1., § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *see also* Paschal, *supra*, at 611 (purpose of Suspension Clause to establish "the strongest guarantee consistent with a power of self-preservation"). State constitutions provided similar guarantees. Dallin H. Oaks "Habeas Corpus in the States—1776-1875," 32 *U. Chi. L. Rev.* 243, 249 (1965) ("All twenty-one of the new states admitted after 1787 and prior to 1860 [except Vermont] wrote into their constitutions a habeas corpus provision practically (and in most cases exactly) identical to the federal provision.").

91. The only three colonies that voted against the provision did so because they believed no authority should be given to suspend the writ under any circumstances. Oaks, "Habeas Corpus in the States," *supra*, at 248.

grant of emergency detention power in the Constitution.[92] It provides the linchpin of the guarantees against unlawful government restraints contained in the Bill of Rights,[93] and has appropriately been called "the most important human right in the Constitution."[94]

The power to suspend habeas corpus required express authorization from Congress. This was the English practice with which the Framers were familiar; nor, given the climate of fear of executive power in the late 1780s, would they have given the president more power than the king.[95] Indeed, the king did not suspend the writ without Parliament's approval even during the Revolutionary War, when he sought to detain those suspected of offenses against the crown.[96] The post-1776 practice of the American states was no different,[97] including the last pre-

92. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) (Suspension Clause constitutes only "express provision for exercise of extraordinary authority because of a crisis" in Constitution).

93. U.S. Const. amend. VI (right to "speedy and public trial," to be confronted with adverse witnesses and to compel production of favorable ones, and to "the assistance of counsel"); *id.* amend. V (right to privilege against self-incrimination, to due process, and to presentment or indictment by grand jury for a "capital, or otherwise infamous crime" except in "cases arising *in* the land or naval forces, or *in* the militia, when in actual service in time of war or public danger") (emphases added); *see also id.* amend. IV (no "unreasonable searches and seizures" or warrants except based on "probable cause"). The right to a speedy trial, for example, also has "roots at the very foundation of our English law heritage." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (tracing guarantee not to "deny or defer to any man either justice or right" to the Magna Carta).

94. Chafee, *supra*, at 143.

95. "Developments in the Law—Federal Habeas Corpus," 83 *Harv. L. Rev.* 1038, 1264 (1970).

96. 17 Geo. 3, c. 9 (1777) (suspending writ for those charged with or suspected of committing high treason in American colonies or on high seas, or crime of piracy).

97. Oaks, "Habeas Corpus in the States," *supra*, at 251 ("[I]n each of at least six recorded instances where the writ was suspended during

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ratification instance of suspension, a 1786 Massachusetts act passed during Shays' Rebellion to preserve public safety against a "violent" insurrection "by armed bodies of men."[98] The principle of exclusive legislative suspension power was endorsed by the Supreme Court,[99] early commentators,[100] and, implicitly, President Jefferson himself, who sought (and was denied) Congressional authorization to suspend the writ in the face of Aaron Burr's conspiracy to wage war against the United States.[101] This principle embodies the Framers' fear of unchecked executive power and their belief that the "separate and distinct exercise of the different powers of government . . . was essential to the preservation of liberty."[102] Subsequent history confirms that Congress alone can authorize the suspension of habeas corpus,[103] and demonstrates that the writ's

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or before the War for Independence, this power was exercised by the legislature and not by the executive.").

98. Act of Nov. 10, 1786, ch. 10, 1786 Mass. Acts & Laws 510. The act expired by its own terms the following year. *Id.*

99. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (Marshall, C.J.) ("If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so.").

100. Story, *supra*, § 1342, at 214-15.

101. "Developments in the Law—Federal Habeas Corpus," *supra*, at 1265; Paschal, *supra*, at 623. A suspension bill was passed by the Senate, but rejected by the House. Paschal, *supra*, at 623-24. It would have suspended the writ for persons "charged on oath with treason, misprision of treason, or other high crime and misdemeanor, endangering the peace, safety, or neutrality of the United States." 16 *Annals of Congress* 402 (1807), *quoted in* Duker, *supra*, at 136.

102. *The Federalist* 51, at 321 (James Madison) (Clinton Rossiter ed. 1961).

103. Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14, 14-15 (authorizing suspension during Reconstruction to combat "armed" and "organized" "unlawful combinations" that directly threatened government); Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692 (Cont'd)

temporary suspension provides the proper means of detaining members of armed and organized groups that pose a danger to the state without the "usual procedures of due process."[104]

The Framers thus followed English practice by establishing habeas corpus as the ultimate safeguard against executive detention without due process. Congress was given exclusive authority to suspend the writ, and that power was expressly constricted by the text of the Suspension Clause itself.

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(authorizing suspension in Philippines); Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 153 (1900) (authorizing later suspension of writ in Hawaii during World War II). President Lincoln's suspension of the writ during the Civil War was deemed unconstitutional. *Ex parte Merryman*, 17 F. Cas. 144, 148-49 (C.C.D. Md. 1861), and Congress later approved the suspension, underscoring the necessity of legislative authorization. Act of Mar. 3 1863, ch. 81, § 1, 12 Stat. 755. Moreover, Lincoln's executive suspension in places like Maryland, considered a site of insurrection, may be characterized as an "emergency military measure." *E.g.*, Daniel Farber, *Lincoln's Constitution* 163 (2003). The broader use of martial law was rejected in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), which reaffirmed the common law rule precluding its application where "the courts are open, and in the proper and unobstructed exercise of their jurisdiction." *Id.* at 127. This Court's narrow holding in *Ex parte Quirin*, 317 U.S. 1 (1942), did not displace the core principles of the Anglo-American tradition embodied by *Milligan*. *See* Brief *Amicus Curiae* of the ACLU.

104. Lou Falkner Williams, *The Great South Carolina Ku Klux Klan Trials, 1871-1872*, at 46 (1996) (temporary suspension pursuant to 1871 act by President Grant in nine South Carolina counties in state of rebellion allowed officials "to make mass arrests quickly" and detain without formal charges); *see also Fisher v. Baker*, 203 U.S. 174, 179-80 (1906) (suspension pursuant to 1902 act in two provinces of Philippines to combat "organized" gangs whose violent acts had created "a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct [criminal investigations]") (internal quotation marks and citation omitted).

B. As in England, the Protections Secured by Habeas Corpus Were Not Subordinated to Military Power

Military abuses by the crown helped drive colonial leaders to seek independence from England,[105] and caused them to limit military power under their own Constitution. The Framers certainly recognized the importance of the executive's role as commander-in-chief under Article II, but refused to let those powers swallow up the protections against unlawful detention guaranteed by the Suspension Clause. Indeed, the Founding generation adhered to these principles despite a weak central government vulnerable to continued threats from more powerful European nations and hostile Indian tribes, the only foreign war fought principally on U.S. soil, and violent insurrections or conspiracies to destroy the United States during the first four presidencies.[106]

The Constitution grounded the executive's military power in approval by Congress.[107] The first Congress passed legislation

105. *The Declaration of Independence* para. 14 (1776) (rendering military "independent of and superior to the Civil power"); *id.* para. 16 ("[q]uartering large body of armed troops among us").

106. President Washington confronted armed insurrection during the Whiskey Rebellion in Pennsylvania; President Adams also faced violent revolt in that state; President Jefferson encountered Aaron Burr's conspiracy to sever the western United States from the rest of the nation; and President Madison contended with plans of New England secessionists to break away from the Union during the War of 1812. David B. Kopel & Joseph Olson, "Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation," 21 *Okla. City U. L. Rev.* 247, 345 (1996).

107. U.S. Const. art. I, § 8, cl. 14 (authorizing Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces"); *id.* art. I, § 8, cl. 15 (authorizing Congress "[t]o provide for calling forth the militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"); *id.* art. I, § 8, cl. 16 (authorizing Congress "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States").

placing military troops under congressional authority;[108] Congress amended this legislation in 1806 to establish articles of war to govern the country's military forces.[109] The 1806 statute carefully limited military jurisdiction, even in time of war, to those who were not citizens or did not otherwise owe allegiance to the United States, and who were apprehended spying in or near U.S. army fortifications or encampments,[110] thus codifying the unique wartime treatment of spies.[111] President James Madison, himself one of the key drafters of the habeas provision in the Constitution, and of the Bill of Rights, recognized the importance of the supremacy of civilian authority

108. Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96 ("[Military] troops shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war, as may hereafter by law be established.").

109. American Articles of War of 1806, enacted April 10, 1806, *reprinted in* Winthrop, *supra*, at 976.

110. *Id.* art. 101(2), *reprinted in* Winthrop, *supra*, at 985. Congress lifted the limitation during the Civil War so that confederate soldiers and sympathizers could be tried. Winthrop, *supra*, at 766. Contemporary commentators construed other provisions of the 1806 Articles of War narrowly to exclude civilians and thus avoid the "military despotism" that comes with the subordination of civilian authority to military power. *E.g.* Isaac Maltby, *A Treatise on Courts Martial and Military Law* 37-40 (1815).

111. Jonathan Turley, "Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy," 70 *Geo. Wash. L. Rev.* 649, 724 (2002); *see also* Winthrop, *supra*, at 769 ("Under the law of nations and of war, [a spy's] offense is an exclusively military one, cognizable only by military tribunals."); *id.* at 771 (special treatment of spies based not on "any peculiar depravity attaching to the act" but on particular logic of rules of warfare). The special treatment of spies was recognized by statute in 1776, Winthrop, *supra*, at 765 (citing Resolution of the Continental Congress of Aug. 21, 1776), and explains the fate of British spy John Andre, captured behind enemy lines in civilian clothes and executed after a proceeding before a board of inquiry. Turley, *supra*, at 720-24. Notably, Joshua Hett Smith, the civilian charged with Andre, was given a civilian trial for his involvement in espionage. *Id.* at 724.

even while serving as commander-in-chief during the War of 1812. When a court-martial found Elijah Clark guilty of spying in August of 1812 and ordered his execution, Madison intervened on the ground that the military lacked the power to try him as a spy, directing that Clark be released unless "arraigned by the civil courts for treason" or some other criminal offense.[112]

Throughout the Founding era, offenses by supposed enemies of state were prosecuted criminally for treason.[113] Indeed, the very definition of this offence in Article III of the Constitution contemplates the exercise of federal court jurisdiction over war-like acts against United States[114] by those who owe a duty of allegiance.[115] In *Ex parte*

112. "Case of Clark the Spy," 1 *The Military Monitor, and American Register* 121-22 (Feb. 1, 1813) (emphasis omitted).

113. *E.g.*, *Case of Fries*, 9 F. Cas. 924, 924, 932 (C.C.D. Pa. 1800) (conviction for assembling with a "great number" of persons "armed and arrayed in a warlike manner . . . to oppose and prevent, by means of intimidation and violence, the execution of [the laws of the United States]"); *United States v. Vigol*, 28 F. Cas. 376 (C.C.D. Pa. 1795) (conviction for participation in the Whiskey Rebellion, an armed resistance quashed by federal troops); *United States v. Mitchell*, 26 F. Cas. 1277 (C.C.D. Pa. 1795) (same); *see also United States v. Lee*, 26 F. Cas. 907 (C.C.D.C. 1814) (acquittal in prosecution for supplying enemy and informing them of troop locations); *cf.* Hurst, *supra*, at 272 (during colonial period, treason used to "ward off . . . extreme dangers to the security of the states").

114. U.S. Const., art. III, § 3, cl. 1 (defining treason as "levying War against [the United States], or in adhering to [its] enemies, giving them Aid and Comfort"); *see also United States v. Hoxie*, 26 F. Cas. 397, 398 (C.C. Vt. 1808) (construing treason to include "the embodying of a military force, armed and arrayed, in a warlike manner, for the purpose of forcibly subverting the government, dismembering the Union, or destroying the legislative functions of congress"). Moreover, like the provision for habeas corpus, the Treason Clause was listed in answer to the criticism that the Constitution lacked a bill of rights. *The Federalist* 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

115. Treason was not traditionally limited to citizens but also encompassed aliens residing in the United States who owed allegiance (Cont'd)

Bollman,[116] Chief Justice Marshall dismissed the charges against Aaron Burr's co-conspirators, Erick Bollman and Samuel Swartwout, for levying war against the United States.[117] He construed the offense narrowly, emphasizing the stigma treason accusations carried and the particular danger of their misuse.[118] Marshall, however, never suggested that individuals like Bollman and Swartwout could be confined outside a criminal proceeding, but rather emphasized Congress' power to enact statutes to punish militant conspirators for "[c]rimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society."[119] And, indeed, Congress has since enacted numerous

(Cont'd)
to the country. *E.g.*, *Carlisle v. United States*, 83 U.S. 147, 155 (1872) (even temporarily domiciled aliens owe obligation of fidelity and obedience, and are subject to prosecution for treason). *Amici* do not address the distinct question posed by the preventative detention of "enemy aliens." *See* Alien Enemies Act of July 6, 1798, ch. 66, 1 Stat. 577 (currently codified at 50 U.S.C. §§ 21-24 (1994)). This emergency power is based on express congressional authorization, *e.g.*, *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814) (Marshall, C.J.), and, moreover, is confined to a declared war between the United States and a foreign nation or government and to the "natives, citizens, denizens, or subjects of that hostile nation or government," 1 Stat. 577, thus precluding the dangers to individual liberty a broader grant of executive power would pose. And, as in England, habeas corpus was available to "enemy aliens" to challenge the jurisdictional facts underlying their detention. *E.g.*, *Lockington's Case*, Bright (N.P.) 269, 283 (Pa. 1813) (Tilghman, C.J.) (British citizen detained during War of 1812); *id.* at 298-99 (Brackenridge, J.) ("I do not see that any *habeas corpus* can issue, *unless* the applicant can make an affidavit in the first instance, that he is not an alien enemy . . . .") (second emphasis added).

116. 8 U.S. (4 Cranch) 75 (1807) (Marshall, C.J.).

117. *Id.* at 135.

118. *Id.* at 125 ("[T]here is no crime which can more excite and agitate the passions of men than treason. . . .").

119. *Id.* at 126-27; *see also id.* at 127 (these individuals "should receive such punishment as the legislature in its wisdom may provide").

criminal statutes punishing war-like acts and conspiracies against the United States.[120]

In short, the protections of habeas corpus against unlawful and indefinite detention by the executive were not subordinated to military power, even during wartime.

C. Habeas Corpus Ensured Meaningful Review for those in Military Custody

Even if, as the Solicitor General asserts, the President has the authority to detain individuals like Padilla outside the civilian justice system, he nonetheless cannot confine such persons without meaningful judicial review of the allegations against them.[121] Since this Court's first habeas cases, the writ has enabled prisoners to contest the facts underlying their executive detention.[122] For those in military custody, the writ has ensured that the officials exercising their authority remained within proper bounds, thus providing a fail-safe against the "historic

120. *E.g.*, 18 U.S.C. § 2384 (criminalizing seditious conspiracy, including conspiracy to levy war against United States); *id.* § 2332a(a) (criminalizing use, attempted use, or conspiracy to use weapons of mass destruction); *id.* § 844 (criminalizing certain manufacture and handling of explosive materials). None, of course, contains the particular evidentiary requirements of the Treason Clause. *E.g.*, U.S. Const. art. III, § 3, cl. 1 (conviction for treason only "on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court").

121. Whether the President has the authority to seize and detain Padilla as an "enemy combatant" encompasses the subsidiary issue of whether that purported authority is so broad as to include a denial of his right to contest the facts on which that unilateral executive designation is based, or to consult with counsel, which the government has only recently provided as a matter of discretion and with significant restrictions. Sup. Ct. R. 14(a). The issue of the President's authority to seize and detain individuals as "enemy combatants" without meaningful judicial review is also before this Court in *Hamdi v. Rumsfeld*, No. 03-6696, *cert. granted* Jan. 9, 2004.

122. *E.g.*, *Bollman*, 8 U.S. (4 Cranch) at 135 (discharging prisoners charged with treason based on insufficient evidence); *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 17-18 (1795) (bailing prisoner arrested for treason after review of factual basis for commitment).

fear of the corrosive effect upon liberty of exaggerated military power."[123] By scrutinizing the legality of military confinement, the writ has historically performed "what is its perhaps most essential judicial task: freeing persons from illegal official restraints not founded in judicial action."[124]

During the War of 1812, habeas was viewed as a remedy against unlawful military confinement.[125] For example, in *In re Stacy*,[126] the court reviewed a habeas petition filed by Samuel Stacy, detained as a spy and traitor at Sackets Harbor on Lake Ontario, an area both sides viewed as critical to the success of the war.[127] Stacy's capture had come shortly after British troops had landed, attacked, and nearly captured Sackets Harbor,[128] and U.S. military commanders blamed Stacy for the near-loss of this critical military post.[129] Stacy claimed he was exempt from military jurisdiction based on U.S. citizenship, and the court issued a writ of habeas corpus commanding the military to produce him.[130] When the official refused, Chancellor Kent sought enforcement, declaring that "[a] military commander" was "assuming criminal jurisdiction over a

123. "Developments in the Law—Federal Habeas Corpus," *supra*, at 1210 (internal quotation marks and citation omitted).

124. Oaks, "Habeas Corpus in the States," *supra*, at 266.

125. Counsel for *amici* are grateful for the suggestions of Professor Ingrid Brunk Wuerth, which informed this section's discussion of judicial review of executive detention during the War of 1812, and which are discussed in greater detail in Ingrid Brunk Wuerth, "The President's Power to Detain 'Enemy Combatants': Modern Lessons from Mr. Madison's Forgotten War," 98 *Nw. U.L. Rev.* (forthcoming 2004).

126. 10 Johns. 328 (N.Y. Sup. Ct. 1813) (Kent, C.J.).

127. Robert Malcomson, *Lords of the Lakes: The Naval War on Lake Ontario, 1812-1814*, at 16 (1998).

128. *Id.* at 127-29.

129. 2 *The Naval War of 1812: A Documentary History* 499, 521 (William S. Dudley ed. 1992) (citing letter from Commodore Isaac Chauncey to Secretary of the Navy William Jones).

130. 10 Johns. at 328-29.

private citizen, . . . holding him, in the closest confinement, and contemning the civil authority of the state."[131]

The military's unlawful confinement of a civilian was also the basis for the court's decision in *Smith v. Shaw*.[132] Shaw too had been held at Sackets Harbor on spying and other charges. When Shaw sued for false imprisonment following his release, the military maintained it had the authority to detain him pursuant to a court-martial or, at a minimum, pending its investigation of the facts since Shaw's detention was "essential to the public safety."[133] The court, however, concluded that Shaw, as a U.S. citizen, was not subject to military jurisdiction and affirmed the damage award[134] for his approximately two-week-long confinement.[135] Its decision rested partly on basic principles of habeas law. Specifically, Chief Judge Smith Thompson explained that the military's contention that Shaw's detention was for the purpose of trying him by court-martial would have been insufficient to defeat a habeas petition, as it was for the courts to determine whether Shaw was subject to military detention in the first place.[136]

131. *Id.* at 334. Stacy was subsequently released by the Secretary of War, who recognized the military lacked authority over him. 2 *The Naval War of 1812*, *supra*, at 521 n.1 (no authority for military to detain citizen as spy under Articles of War of 1806); *cf.* Abraham D. Sofaer, "Emergency Power and the Hero of New Orleans," 2 *Cardozo L. Rev.* 233, 242-43, 248 (1981) (court imposed contempt sanction and fine on General Andrew Jackson for flouting writ of habeas corpus challenging Jackson's exercise of court-martial jurisdiction in New Orleans near end of War of 1812). Although decided under state law, cases from this era demonstrate courts' general understanding of the nature and purpose of habeas corpus. *Cf.* Gerald L. Neuman, "Habeas Corpus, Executive Detention, and the Removal of Aliens," 98 *Colum. L. Rev.* 961, 993 (1998) (state courts' application of habeas law to enemy aliens).

132. 12 Johns. 257 (Sup. Ct. N.Y. 1815) (Thompson, C.J.).

133. *Id.* at 261.

134. *Id.* at 259, 268.

135. *Id.* at 257-58.

136. *Id.* at 266-67.

Enlistment cases from the same period further underscore the writ's role in remedying abuses by the military. To meet a pressing military need during the war, the federal government paid bounties to enlistment brokers for each new recruit obtained, a practice that led to a number of fraudulent enlistments, including of minors.[137] On habeas petitions challenging the enlistments, courts refused to be bound by the facts stated in the return, and instead exercised their power "to inquire into the circumstances" under which an individual was unlawfully restrained of his liberty.[138] Federal courts similarly held evidentiary hearings in challenges to military enlistments on habeas, allowing applicants to contest the facts asserted in the custodian's return.[139] In providing relief against "abuses of power by government officials," the writ thus enforced "the principle that in a free country, the civil power must predominate."[140]

Here, the Solicitor General maintains that the district court must confine its inquiry solely to whether the executive's submissions provide "some evidentiary support" that Padilla falls within the class of persons the President has deemed "enemy combatants."[141] Such an eviscerated notion of habeas review is

137. Marc M. Arkin, "The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners," 70 *Tul. L. Rev.* 1, 14-15 (1995).

138. *Commonwealth v. Harrison*, 11 Mass. 63, 65 (1814); *see also Commonwealth v. Cushing*, 11 Mass. 67, 67, 71 (1814) (accepting alleged deserter's affidavit and ordering his release from military custody on ground enlistment was void since he was minor when enlisted); Arkin, *supra*, at 18 (state courts generally refused to accept returns of military officials "at face value").

139. Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 27-28 & 165 n.55 (2001) (citing cases).

140. William E. Nelson, "The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws," *in Law in Colonial Massachusetts, 1630-1800*, at 419, 457 (1984).

141. Br. of Resp't-Appellant to the U.S. Court of Appeals for the Second Circuit at 47. The "some evidence" standard has been (Cont'd)

at odds with the writ's long established role of remedying unlawful and indefinite executive detention. Indeed, the scope of review articulated by the government is strikingly similar to the minimal review exercised under a suspension act, where, as noted above, a court's inquiry was confined to determining whether a prisoner was within the category of persons for whom the writ's core protections — accusation and trial — had temporarily been suspended.[142] Congress, however, has not suspended habeas corpus, and the writ's history demonstrates that the President thus lacks the authority to detain Padilla indefinitely without criminal charges and trial or, at a minimum, without some other meaningful opportunity to contest the allegations against him.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the judgment of the Court of Appeals.

(Cont'd)
inappropriately transported from an entirely different context, where a habeas court exercises supervisory review over a prior administrative proceeding conducted in accordance with due process, and not, as here, where it provides the sole safeguard against indefinite executive detention without any underlying process at all. Resp. Br. for Resp't-Appellant-Cross Appellee to the U.S. Court of Appeals for the Second Circuit at 41 (citing cases). *See generally* Gerald L. Neuman, "The Constitutional Requirement of 'Some Evidence,'" 25 *San Diego L. Rev.* 631 (1988) ("some evidence" standard method of review employed when applicant seeks judicial scrutiny of previous adjudicatory proceeding in which he could present evidence and contest government's factual assertions).

142. *See supra* notes 39-40; *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130-31 (1866) ("[T]he suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.").

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Supreme Court of the United States

DONALD H. RUMSFELD,
Secretary of Defense,

Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN,
As Next Friend of Jose Padilla,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* PRACTITIONERS AND SPECIALISTS IN THE INTERNATIONAL LAW OF WAR IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are practitioners and specialists in the international law of war, also called international humanitarian law.[1]

Payam Akhavan served as a Legal Advisor to the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia.

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Cara Robertson served as a Legal Advisor to the Appeals Chamber at the International Criminal Tribunal for the Former Yugoslavia.

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[1] Letters of consent to the filing of this brief accompany this brief. Pursuant to S.Ct. Rule 37.3, *Amici* certify that no counsel for a party authored this brief in whole or in part and that no person, other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Stephen Saltzburg is the General Counsel for the National Institute of Military Justice and a professor of law at George Washington Law School.

Marco Sassòli served as the deputy head of the legal division of the International Committee of the Red Cross, the international body charged with implementing the Geneva Conventions, and is a professor of international law at the University of Québec.

Michael P. Scharf is a professor of law and Director of the Frederick K. Cox International Law Center and War Crimes Research Office at Case Western Reserve University School of Law.

Minna Schrag is a former senior trial attorney in the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia.

They file this brief to correct certain misconceptions regarding the scope and applicability of the law of war that arise from the Government's assertions in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Government relies on precedents and standards allegedly provided by the "law of war" to justify its treatment of the Respondent, Jose Padilla. (Br. for Pet'r at 6, 28) (asserting that the President's determination of Padilla's enemy combatant status and Padilla's capture and detention done pursuant to the "law of war"). By this phrase, the Government is referring to the international law of armed conflict, a body of law that comprises the international treaties governing armed conflict (principally the Geneva and Hague Conventions) and the customary

rules regarding such conflicts followed by nations out of a sense of legal obligation. *See Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals").

Although the Government relies upon the international law of armed conflict as the ultimate source of the President's authority to detain Padilla, it provides no analysis of that body of law or its application to this case. In fact, the law of war furnishes no basis for treating Padilla as a combatant in an armed conflict governed by the rules of this body of law. Indeed, although this Court need not reach that question to decide this case, categorizing the "war on terror" or the pursuit of al Qaeda suspects as an armed conflict is itself unprecedented and without support in international humanitarian law.

Under the law of war, "combatants" are defined principally as "members of the armed forces of a Party to a conflict." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter Additional Protocol I];[2] *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(2) [hereinafter Third Geneva Convention] (further defining those combatants entitled to prisoner of war status to include certain members of militias). Persons who are not

[2] International treaties are referred to herein in an abbreviated form. Complete citations are provided in the Table of Authorities.

members of the armed forces of a Party to a conflict and who are not on the actual field of battle wielding weapons have not traditionally been treated as combatants, lawful or unlawful. Instead, to the extent they have conspired to engage in violent acts, they have been treated as criminals under the domestic law of the captor.

Indeed, in U.S. law, this point was firmly established by *Quirin*, the very case on which the Government places primary reliance for its detention of Padilla as an enemy combatant. In *Quirin*, members of the armed forces of Nazi Germany, who had landed in uniform in the United States and then shed their uniforms in a plot to commit acts of sabotage, were treated as "enemy combatants" and tried before a military commission. *Quirin*, 317 U.S. at 21-22. However, those persons who aided the plot in the United States but who were not themselves members of the German army were not held as "unlawful combatants." They were instead tried in ordinary civilian courts for crimes such as treason. *Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943); Louis Fisher, *Nazi Saboteurs on Trial* 80-84 (2003).

In this case, the Government does not allege that Padilla ever participated directly in combat and claims only that Padilla is "associated" with al Qaeda, much as Haupt and Cramer were associated with the German saboteurs. The Government's own allegations dictate that Padilla be tried under civilian criminal jurisdiction like the detainees in *Haupt* and *Cramer*, not like the combatants in *Quirin*. *See Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003), (Wilkinson, C.J., concurring in the denial of rehearing en banc) ("To compare this battlefield capture

to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges.").

Contrary to the Government's suggestion, its detention of Padilla as a so-called "unlawful combatant" is not a routine application of the customary law of war. Rather, the Government's detention dramatically expands the law of war (and correspondingly, the powers of the President as Commander in Chief) in unprecedented and illegal directions. The Government has every right to treat Padilla as an accused terrorist and criminal defendant, but it may not – by the force of its own rhetoric surrounding the "war on terror" – convert him into a combatant in an international armed conflict in order to justify his detention without charge or trial.

ARGUMENT

I. THE GOVERNMENT MISAPPLIES INTERNATIONAL HUMANITARIAN LAW TO THE WAR AGAINST TERRORISM.

International humanitarian law (IHL), sometimes referred to by its older label, the "law of war,"[3] is the body of international law that regulates the methods, targets, and means of waging armed conflict. *See* Dep't of the Army, *The Law of Land Warfare, Field Manual* 27-10,

[3] The terms "law of war," "law of armed conflict," "international humanitarian law," and "IHL" are used interchangeably throughout this brief.

paras. 2-3 (1956) [hereinafter *The Law of Land Warfare*].[4] International humanitarian law is a complex body of law. While this brief cannot provide a comprehensive overview of IHL, even a brief review – particularly of the Geneva Conventions – demonstrates the Government's misuse of the law of war.

International humanitarian law does not govern a state's initial decision to use military force. Once armed conflict has begun, however, IHL provides a set of rules that, in their broadest form, prohibit the deliberate targeting of those not directly participating in hostilities and limit the violence and destructiveness of the tactics employed to that level necessary to achieve the aim of the conflict. *See* Marco Sassòli & Antoine A. Bouvier, *How Does Law Protect in War* 67 (Int'l Comm. of the Red Cross, 1999); *The Law of Land Warfare* para. 3.

International humanitarian law derives from two sources: treaties and customary international law. *See The Law of Land Warfare* para. 4. Much of IHL is contained in treaties. For example, the four 1949 Geneva Conventions [hereinafter the Geneva Conventions] that govern the treatment of wounded and sick soldiers (First Geneva Convention), sailors (Second Geneva Convention), prisoners of war (Third Geneva Convention), and civilians

[4] *The Law of Land Warfare* "is an official publication of the United States Army." Originally published in 1956, it is still regarded as an authoritative treatment of the law of war, and, although it lacks binding legal force, its provisions are "of evidentiary value insofar as they bear upon questions of custom and practice." *Law of Land Warfare* para. 1.

(Fourth Geneva Convention)[5] in international armed conflicts are treaties that 191 nations have ratified, including Afghanistan, Iraq, and the United States.[6] Because treaties are essentially contracts between nations, the Geneva Conventions technically bind only the nations that have ratified them and, according to their explicit language, they principally apply only to armed conflicts between these nations. *See* Geneva Conventions, Common Article 2 ("[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties. . . . ").[7] For example, the Geneva Conventions clearly apply to the armed conflicts involving the United States, Afghanistan and Iraq, because these nations have ratified the Conventions.[8]

In addition to treaties, IHL is also found in customary international law. *See The Law of Land Warfare* para. 6. Customary international law consists of rules derived from the actual practice of nations developed gradually over time that are followed from a sense of legal obligation. *See*

[5] Another important series of treaties, first adopted in 1907, addresses the means and methods of warfare. These are sometimes referred to collectively as the "Hague Conventions" or "Hague law."

[6] *See* Int'l Comm. of the Red Cross, States Party to the Geneva Conventions and their Additional Protocols (May 20, 2003) <*www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc*> (States Party to the Geneva Conventions).

[7] The first few articles of the four 1949 Geneva Conventions are identically worded, and are sometimes referred to as the Common Articles, e.g., Common Article 2 or Common Article 3.

[8] *See* States Party to the Geneva Conventions (May 20, 2003) <*www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc*>.

The Paquete Habana, 175 U.S. 677, 711 (1900). Once a rule of customary international law emerges, it binds all nations, except for those states that have specifically and repeatedly objected to the rule. Like the common law, customary international law is not consolidated in any authoritative source but instead is found in many sources, such as judicial decisions interpreting international law, statements by government officials, and scholarly books and articles on international law. *See The Law of Land Warfare* para. 6.

The distinction between IHL that derives from treaties and IHL that forms part of customary law is not clear-cut. Some international treaties setting out the law of war largely represent codifications of pre-existing international customary rules, and sometimes treaty rules over time take on the status of customary international law. *See* Dep't of Army, *Law of War Workshop Deskbook* 26 (Brian J. Bill, ed., 2000); *The Law of Land Warfare* para. 6. For example, although the United States has not ratified the 1977 Additional Protocols I and II to the Geneva Conventions (which provide further rules for international and non-international armed conflicts, respectively), it recognizes that most of their provisions now constitute customary international law binding upon the United States. *Law of War Deskbook* 32; Dep't of Army, *Operational Law Handbook* 11 (T. Johnson ed., 2003).[9]

[9] To the extent that this brief relies on the Additional Protocols, it relies only on those portions which the United States has either explicitly recognized as part of customary international law or to which the United States has not objected.

The field of IHL is divided into an elaborate body of law regulating international armed conflicts and a less-developed legal doctrine governing non-international armed conflicts (typically civil wars). Once the rules of IHL apply to a situation, the law of war provides a comprehensive framework for the treatment of any individuals caught up in the conflict. As the Commentary to the Fourth Geneva Convention notes:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention. . . . *There is no* intermediate status; nobody in enemy hands can be outside the law.[10]

Under IHL, individuals caught up in a conflict must either be classified as combatants or non-combatants, with only combatants being lawful targets for military action. *See, e.g.*, Additional Protocol I art. 48. So long as they are not disarmed or surrendering, combatants may be attacked with lethal force wherever they are found.[11] Thus, if Padilla (and all other persons who have associated with al

[10] *See* Int'l Comm. of the Red Cross, *Commentary to the IV Geneva Convention* 51 (Jean S. Pictet ed., 1958) [hereinafter *ICRC Commentary to the Fourth Geneva Convention*]; Fourth Geneva Convention arts. 4(1) & 4(3); Additional Protocol I art. 50; *Law of Land Warfare* para. 73.

[11] While it is forbidden "to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion," Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 23(c), IHL authorizes attacks on "individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or else-where." *The Law of Land Warfare* para. 31.

Qaeda) truly were "combatants," the law of war would not only allow them to be held until the end of active hostilities, but it would allow them to be shot upon discovery, at any point, anywhere in the world – whether on a road in a faraway place or in a U.S. airport.[12]

II. PADILLA IS NOT A COMBATANT UNDER THE LAW OF WAR.

The Government indiscriminately invokes IHL terminology without reference to its context or relationship to other parts of that law to justify its indefinite detention of Padilla. IHL, however, is a highly technical and complex body of law, following its own internal logic and shaped by history, politics, and military technology. IHL treaties are carefully negotiated, and their language is often abstruse. One cannot pluck a phrase from the law of war and apply it out of context. Correctly read, the rules of IHL compel the conclusion that Padilla is not a "combatant" in any "armed conflict" (international or non-international) as those terms are defined in IHL. This Court, therefore, must find the legal principles relevant to his detention in domestic constitutional or criminal law and in other bodies of international law (for example, treaties on terrorism or international human rights law).

IHL is divided into two broad sub-fields: that regulating "international armed conflicts" and that regulating "non-international armed conflicts." In order to understand which of these sub-fields applies to Padilla's case,

[12] The Government might also be allowed to inflict collateral damage on bystanders. *See* Additional Protocol I art. 51.

one must determine the nature of the conflict in which Padilla has allegedly served as a combatant. The Government fails to provide a legal analysis of either the conflict in which it believes Padilla has participated as a combatant or the basis for classifying Padilla as a combatant under the law of war. A systematic approach to both questions, however, reveals that Padilla cannot be considered a combatant – illegal or legal – in any cognizable armed conflict within the framework of the existing laws of war.

A. Padilla is not a Combatant in an International Armed Conflict.

By definition, "an international armed conflict" must involve the armed forces of two or more nation states. By their terms, the Geneva Conventions apply only to international armed conflicts between two or more of the states that have ratified those conventions (the "High Contracting Parties").[13] Because al Qaeda is not a nation state, it cannot, by definition, be a party to an international armed conflict under IHL.

By contrast, "Operation Enduring Freedom" in Afghanistan clearly met the definition of international armed conflict. It involved fighting between the organized military forces of Afghanistan and the United States (among other countries), both of which are High Contracting Parties to the Geneva Conventions. Although it has

[13] The Geneva Conventions also apply to territorial occupations of one of the High Contracting parties and to conflicts between High Contracting Parties and other nations if those nations agree to apply the provisions of the Conventions. Neither of these situations is relevant to this case.

not done so in its arguments before this Court, the Government might contend that Padilla should be deemed a combatant in the Afghanistan conflict based on his alleged association with al Qaeda. In both a factual and legal sense, however, Padilla cannot be deemed a "combatant" in the "international armed conflict" between the United States and Afghanistan.

The Geneva Conventions, and especially Additional Protocol I, prescribe with considerable detail the rights and duties of people caught up in an armed conflict. Additional Protocol I states that "combatants," who are "members of the armed forces of a Party to a conflict," art. 43(2), are lawful military targets, while non-combatants are not.[14] This definition deliberately limits the class of people who lawfully may be targeted by opposing military forces. People who are actually in the armed forces are deemed combatants and are generally lawful targets;

[14] It further defines combatants to include:

> "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."

Additional Protocol I art. 43(1). Members of disorganized militia groups who are not under a command responsible to a State Party to the conflict are not combatants under this definition. Conversely, civilians are defined as persons who do not fall into one of the categories of persons entitled to prisoner of war status pursuant to article 4 of the Third Geneva Convention and article 43 of Additional Protocol I. *See* Additional Protocol I art. 50.

people who are not in the armed forces are generally not combatants and are generally not lawful targets.

When a civilian, however, is actually found wielding arms in the zone of combat, he may be treated as a lawful target of attack – but only insofar and as long as he takes a "*direct* part in hostilities."[15] A civilian does not become a combatant because the opposing commander suspects he might, at some point in the future, plot to engage in violent acts.[16] If the rule were otherwise, large parts of the civilian population of a country at war would become lawful targets for attack.

Shooting a gun on a battlefield constitutes taking a "direct part in hostilities." Carrying a gun towards the battlefield with the imminent intent to engage in combat might also amount to taking a direct part in hostilities. By contrast, supporting the enemy cause off the battlefield, conspiring with the enemy, contemplating taking part in battle in the future, and sympathizing with the enemy do not constitute taking a direct part in hostilities under the

[15] Additional Protocol I art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a *direct* part in hostilities.") (emphasis added).

[16] *See* Int'l Comm. of the Red Cross, *Commentary on the Additional Protocols* 619 (C. Pilloud et al. eds., 1987) (noting that there is "a clear distinction between *direct* participation in hostilities and participation in the war effort," for large portions of the civilian population may indirectly support the war effort and should not by virtue of that become targets) (emphasis added) [hereinafter *ICRC Commentary on the Additional Protocols*].

law of war, although those acts may be punishable under domestic criminal law.[17]

A person with civilian status who participates *directly* in hostilities would be violating the laws of war, and in the Government's nomenclature would be labeled an "illegal combatant."[18] "Illegal combatant" or "unlawful combatant" is not a term that appears in any treaty on the law of war. Commentators have occasionally used these phrases to describe someone who does not receive the privileges accorded to combatants, the most important of which are prisoner of war status and immunity from prosecution for engaging in combat. The phrase "unlawful combatant"

[17] *See* Robert K. Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM U. J. INT'L. L. & POL'Y 49, 70 (1993) ("[A] civilian can be considered to participate directly in hostilities when he actually takes part in fighting, whether singly or as a member of a group. Such participation . . . would also include acting as a member of a weapons crew or providing target information for weapons systems 'intended for *immediate use against the enemy*, such as artillery spotters or members of ground observer teams.'") (citation omitted) (emphasis in source); *ICRC Commentary on the Additional Protocols*, at 516 ("Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place."); L.C. Green, *The Contemporary Law of Armed Conflict* 107 (2d ed. 2000).

[18] A civilian who directly participated in hostilities could only be treated as a combatant in the sense that he would become a lawful target of attack for the duration of his participation in combat; in all other senses he would remain a civilian protected by the Fourth Geneva Convention. Fourth Geneva Convention art. 4; *The Law of Land Warfare* para. 73. The Fourth Geneva Convention would not prohibit the detention or criminal prosecution of such a person based on his unlawful participation in hostilities, provided that procedural safeguards were observed. *See* Fourth Geneva Convention arts. 42, 43, 78; Additional Protocol I art. 75(4).

actually encompasses two sets of people: members of the regular armed forces who do not wear uniforms and do not bear arms openly (and thereby lose their privileged combatant status), and civilians who unlawfully participate directly in battle (who never had privileged combatant status to begin with).

As persons in the latter category retain their civilian status, it is arguably improper to refer to them as combatants at all: they are more accurately described as "unprivileged belligerents." *See* George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 Am. J. Int'l L. 891, 893 (2002). The *Quirin* Court's use of the phrase "unlawful combatants," *Quirin*, 317 U.S. at 31, rather than the categories and terminology of the Geneva Conventions, reflects the fact that *Quirin* predates the 1949 Conventions. Its analysis of IHL must therefore be read in conjunction with the subsequent, authoritative Geneva Conventions.

Because Padilla is neither alleged to be a member of a regular armed force nor to have participated directly in any battle, he cannot be categorized as a combatant – lawful or unlawful. The Government does not claim that Padilla participated directly in hostilities in Afghanistan. Indeed, there is no allegation that Padilla played *any* role, direct or indirect, in the conflict between the United States and the armed forces of Afghanistan's Taliban Government. Neither the President's designation of Padilla as an enemy combatant nor the Mobbs Declaration even mentions the conflict in Afghanistan. Presidential Order Transferring Jose Padilla to Enemy Combatant Status para 4 (June 9, 2002) (Pet. App. 57a-58a); Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense of Policy (Aug. 27, 2002) (Mobbs Declaration)

(Pet. App. 167a-172a). Nor is there any allegation that Padilla is a member of any "organized armed forces, groups and units which are under a command responsible to [the Taliban Government] for the conduct of its subordinates."[19]

Members of the Taliban armed forces would properly be considered combatants in the conflict in Afghanistan. Similarly, members of groups associated with the Taliban, such as al Qaeda, who fought on the battlefield in Afghanistan and who served under a command responsible to Taliban officials could also be classified as combatants in that conflict. In addition, any other individuals who fought on the battlefield could be treated as combatants during their actual participation in the fighting. Padilla does not fall into any of these categories and therefore cannot be considered a combatant in the conflict in Afghanistan.

If this Court were to find that Padilla should be considered a combatant in an international armed conflict, it would be implicitly ratifying the position that *any* person ever "associated" with al Qaeda, at any place in the world, and presumably at any time, is also automatically a combatant in the armed conflict *in Afghanistan*. This position would constitute a dramatic extension of the law of war to persons never connected to that armed conflict.

[19] *See* Additional Protocol I art. 43(1). The relevant "Party" in the conflict in Afghanistan is the Taliban Government, which at the time of the hostilities was the *de facto* government of Afghanistan.

B. International and Domestic Law Also Provide no Support for the Characterization of Padilla as a Combatant in a Non-International Armed Conflict.

International and domestic law also provide no support for characterizing Padilla as a "combatant" in any other armed conflict. The Government appears to contend that Padilla's alleged activities, although not specifically part of the conflict in Afghanistan, are linked to the global U.S. campaign against the al Qaeda network. (Br. for Pet'r at 16) (describing this case as concerning "the ongoing conflict against al Qaeda"). As discussed above, such a conflict could not be described as an international armed conflict, because international armed conflicts must involve at least two nation states. *See* Geneva Conventions Common art. 2; *see also* Hilaire McCoubrey & Nigel D. White, *International Law and Armed Conflict* 194 (1992) (defining international armed conflict as "resort *by states* to active and hostile military measures . . . ") (emphasis added). Accordingly, to the extent the interaction between the United States and al Qaeda is an armed conflict within the purview of international humanitarian law, it must be described as a non-international armed conflict, subject to the much less elaborate legal regime regulating such conflicts. Even in the framework of non-international armed conflicts, there is no precedent for treating an individual who is not a member of an organized military force and who has not directly engaged in combat as a "combatant."

In terms of treaty law, non-international armed conflicts are governed by Common Article 3 of the Geneva Conventions and Protocol II Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts

[hereinafter Additional Protocol II], which set out certain minimum standards for humane treatment of opposing parties.[20] Unlike the treaty provisions governing international armed conflict, the treaty provisions governing non-international armed conflict do not explicitly define "combatant." To the extent the law of non-international armed conflict implicitly recognizes a class of persons that may be described as combatants, it includes only members of organized military forces or persons taking a *direct* part in hostilities. As in international armed conflict, civilians in non-international armed conflicts may not be targets of armed attack "unless and for such time as they take a direct part in hostilities." Additional Protocol II art. 13(3). Padilla is not alleged to be a member of al Qaeda, to have engaged in combat, or otherwise to have directly participated in hostilities. As noted previously, contemplating committing acts of violence at some undetermined point in the future does not, under IHL, constitute direct participation in hostilities.

Moreover, while the law of *international* armed conflict specifically allows the detention of prisoners of war until the end of hostilities[21] and the internment of alien civilians for imperative reasons of security during the conflict,[22] IHL provides no independent authority for detaining anyone in *non-international* armed conflicts, even prisoners of war. Instead, it leaves it up to individual states to provide the authority for detention as a matter of

[20] Such standards include the right to fair trial. *See* Geneva Conventions, Common Article 3.

[21] Third Geneva Convention arts. 21, 118.

[22] Fourth Geneva Convention art. 42.

domestic law. Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 Int'l Rev. Red Cross 45, 47 (2003); *ICRC Commentary to Fourth Geneva Convention*, at 44.

Thus, if the Government claims that it has the authority to detain Padilla as a combatant in a non-international armed conflict, it must do so on the basis of positive domestic law. It cannot rely on international law or on domestic cases like *Quirin,* which are based on international law. The President's authority to detain Padilla must, therefore, be found in some domestic source that does not flow from the inherent powers of the Commander in Chief derived from the laws of war.

To the extent there is domestic U.S. law on the status of persons in non-international armed conflict, it is not in the Government's favor. In the most significant non-international armed conflict in which the United States has participated, the Civil War, the Government granted belligerent status to the regular Confederate Army and treated its soldiers as prisoners of war.[23] As discussed further below, this Court determined in the context of that conflict that, under the U.S. Constitution, persons like Padilla were to be prosecuted in civilian criminal courts, and not to be held as prisoners of war or prosecuted in front of courts-martial. *See Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866).

[23] *See* Instructions for the Government of Armies of the United States in the Field (Lieber Code), April 24, 1863 art. 57.

C. Consistent U.S. Practice in Past Armed Conflicts Does Not Support the Treatment of Padilla as a Combatant.

The Government's treatment of Padilla also runs afoul of the consistent past practice of the United States, which in turn is indicative of the customary law of war. A careful examination of U.S. practice dating from the time of the Civil War reveals that only those individuals who were members of conventionally organized armed forces or who were found actively engaging in combat on the battlefield have been considered combatants who need not be tried in civilian courts. *See* Jennifer K. Elsea, *Presidential Authority to Detain "Enemy Combatants,"* 33 Presidential Stud. Q. 568 (Sept. 2003).

During the Civil War, the Supreme Court held that an individual accused of conspiring with a secret society to overthrow the U.S. Government, seize U.S. weapons, liberate enemy prisoners of war, and kidnap elected officials, could not constitutionally be held as a prisoner of war or tried by a military commission. *See Milligan,* 71 U.S. 2. Specifically, the Court found that Milligan could not be tried by military commission because "he was not engaged in legal acts of hostility against the government. . . . " *Id.* at 131. Nor did the Court accept the Government's argument that Milligan, who had never been on the battlefield, could be "held as a prisoner of war, aiding with arms the enemies of the United States, and held, under the authority of the United States, until the war terminates." *Id.* at 21. The Court, instead, found that Milligan should be tried and punished by the courts of Indiana. *Id.* at 131.

During World War I, the Government tried in courts-martial several spies who were members of the German

army and who had entered the territory of the United States. *See, e.g., United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y. 1920) (upholding military jurisdiction and thus the authority to detain). *Id.*, at 760-61. Significantly, two American citizens who were alleged to have conspired to commit espionage with Wessels were tried, and ultimately acquitted, of treason – not in courts-martial – but in federal court. *United States v. Fricke*, 259 F. 673 (S.D.N.Y. 1919); *United States v. Robinson,* 259 F. 685 (S.D.N.Y. 1919).

During World War II, in the *Quirin* case, the defendants had been paid by the German Government, had received instructions from a member of the German High Command, and had been wearing their German army uniforms when they landed in the United States. *Quirin,* 317 U.S. at 20. Although the defendants in *Quirin* were not entitled to treatment as prisoners of war because they had abandoned their uniforms upon entering the country,[24] *id.* at 35 n.12, they clearly remained members of the German armed forces.[25] Indeed, this Court described the defendants' shedding of their German uniforms upon entry in the United States as "essential" to their offense. *Id.* at 38.

Of the many people associated with the saboteurs' plot in *Quirin*, the only ones who were treated as enemy

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[24] It was for this reason that the Court described them as "unlawful combatants." *Id.* at 31.

[25] In *Quirin,* the Court specifically distinguished *Milligan* on the ground that Milligan was not a "part of or associated with the armed forces of the enemy," 317 U.S. at 45, even though Milligan had been accused of being a member of a paramilitary organization associated with the Confederate Army. Elsea, *supra*, at 574.

combatants were members of the German military. Collaborators with the saboteurs and others who conspired with them were tried in federal court. Fisher, at 80-84.[26] The Government nowhere alleges that Padilla is a member of al Qaeda. It merely states that he is "associated" with the al Qaeda network – much as the collaborators in *Quirin* who were tried in federal court were associated with the defendants in that case.

The Government points to no precedent in U.S. history for treating an individual who is not a member of a conventionally organized army or who was not captured on an active battlefield as a combatant. *See* Elsea at 568-69 (describing the Government's definition of "enemy combatant" as "much broader than that which has historically applied during armed conflict and, as applied [to Padilla] appears to be without precedent").

Four years after *Quirin*, a federal court upheld the detention of a U.S. citizen as a prisoner of war (and hence, recognized his status as a combatant). However, the detainee in that case had been inducted into the Italian army, had been captured on the field of battle, and was wearing an Italian uniform. *In re Territo*, 156 F.2d 142, 143 (9th Cir. 1946). Neither *Quirin,* nor *Territo,* nor any case decided by this Court or any of the lower courts, supports detention of Padilla as an enemy combatant. Under controlling domestic law, then, Padilla – who has not participated directly in combat and who is not a member of a regularly organized army – is entitled to a criminal trial.

[26] *See, e.g., Cramer*, 325 U.S. 1; *Haupt*, 136 F.2d 661.

III. THE "WAR ON TERROR" DOES NOT CONSTITUTE AN ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW.

As the Government does not allege that Padilla is a member of al Qaeda, this Court need not determine whether all members of al Qaeda should be viewed as members of an "army" for purposes of IHL. This Court should realize, however, that the Government's assertion that the "war on terror" represents an armed conflict, as that phrase is understood within IHL, is unprecedented, unwarranted, and highly inimical to the careful limitations and underlying principles of this body of law.

Terrorist actions by private groups have not customarily been viewed as creating armed conflicts to which international humanitarian law applies.[27] For example, as the United Kingdom stated when it ratified Additional Protocol I: "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation." Reservation by the United Kingdom to Art. 1, para. 4 & Art. 96, para. 3 of Additional Protocol I (Dec. 12, 1977) <*www.icrc.org/ihl.nsf*>. The British, Spanish, and Peruvian campaigns against the IRA, ETA, and the Shining Path guerrillas, respectively, have not been treated as armed conflicts under IHL.[28] Moreover, international and regional conventions that

[27] *See* Green, *supra,* at 56 ("[A]cts of violence committed by private individuals or groups which are regarded as acts of terrorism . . . are outside the scope of IHL").

[28] McCoubrey & White, *supra,* at 318.

address terrorism do not treat it as an act of war, but instead as grounds for criminal, civil, or administrative liability.[29]

Common sense explains why recognizing the "war on terror" as an armed conflict undermines the traditional protections and limitations of IHL. In a war against terrorism, all of the "combatants" of one side are persons who have taken no direct part in anything resembling traditional combat. In most armed conflicts, membership in the armed forces of a Party provides a straightforward criterion for detention; no dispute would ordinarily arise about whether a soldier taken prisoner is actually in the opposing army. By contrast, it may be factually quite difficult to determine whether an individual is a member of al Qaeda.[30]

To allow the President to condemn to indefinite detention without trial, any person, anywhere – even a U.S. citizen – whom he alleges to be a "member" of al Qaeda (or any other terrorist group), would represent a dramatic extension of the President's powers in derogation

[29] These conventions also require States Party to guarantee fair treatment to those detained on terrorism charges. *See, e.g.,* International Convention for the Suppression of the Financing of Terrorism art. 17; International Convention for the Suppression of Terrorist Bombings art. 14; International Convention Against the Taking of Hostages art. 8; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons art. 9.

[30] By all accounts, al Qaeda itself is a network of "cells" of terrorists operating in many countries, and the precise contours of its organization are unclear. Phil Hirshkorn et al., *Blowback,* Jane's Intelligence Rev., vol. 13, no. 8 (Aug. 1, 2001) <*www.mwarrior.com/alqaeda.htm*>.

of domestic constitutional rights, without any precedent in the laws of war. Moreover, this expansive new power would come without any time limits. IHL anticipates that armed conflict will, at some point, end, and it regulates the return from a state of war to normal life.[31] As defined by the Government, however, the "war on terror" will not end until all terrorists (and all those who are considering engaging in future terrorist acts) anywhere in the world are eradicated.

Finally, if detention of enemy combatants under IHL were extended to the "war on terror," there is little that would prevent its application to other violent, transnational non-state actors, such as narco-traffickers, organized crime, the illegal arms trade, and other such groups. These groups may be highly organized, capable of inflicting violence on governments or individual citizens, and operate with relative impunity in particular states. For example, as this Administration recently noted,

> the illegal drug trade has had a terrible impact on the United States, leading to 50,000 drug-related deaths yearly – 19,000 of these directly attributable to drugs. By way of comparison, drugs claim six times as many lives each year in the United States as did the terrorist attacks of September 11, 2001.[32]

[31] *See, e.g.,* Third Geneva Convention art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").

[32] U.S. Official Lauds Colombian Efforts to Combat Narco-Terrorism – Simons says measures are succeeding, urges continued support, State Department Press Releases and Documents (June 3, 2003), *available at* 2003 WL 2048364.

Nor is there any reason why governments of other nations may not point to U.S practice to justify the detention without trial of all those they deem "terrorists."

Amici fully acknowledge that al Qaeda's terrorist actions are dangerous and illegal, and subject to severe punishment under a host of international and domestic laws. The Executive Branch has every right to arrest alleged members and associates of al Qaeda, including Padilla, and charge them with the crimes the Government believes they have committed. Since federal law includes jurisdiction over inchoate crimes, the Government need not wait for a terrorist to achieve his dangerous goal before arresting and prosecuting him.

Moreover, the fact that the United States' interactions with al Qaeda do not meet the definition of armed conflict under IHL does not mean that IHL prohibits the use of force against al Qaeda. IHL concerns *jus in bello* and regulates the conduct of the warring parties once a situation reaches the level of an armed conflict; it does not address *jus ad bellum*, or the legality of the decision to use armed force in the first place.

What the Government may not do, however, is claim that the customary law of war provides it with a legal justification, which it otherwise lacks under existing domestic law, to hold suspected terrorists indefinitely, incommunicado, without charge, without counsel, and without trial. The law of war provides no such authority.

Merely rehearsing the parallels between *Quirin* and Padilla's case does not substitute for legal analysis. Multi-level agency review, however elaborate, similarly cannot alter the key legal and factual distinctions between Padilla's case and that of the German saboteurs. The defendants in *Quirin* had worn German uniforms, had

been paid by the German government, and were under the command of the German army. In addition, they were participants in a prototypical armed conflict: a full-scale war between two nation states. These facts dictated both the applicable branch of the law of armed conflict (the rules regulating international armed conflict) and the correct classification of the *Quirin* defendants as combatants (because they had been uniformed members of the German army). These factors rendered this Court's determination that the *Quirin* defendants had violated the laws of war – by entering the United States surreptitiously, by submarine, at night and by shedding their uniforms at the water's edge – an easy case. By contrast, Padilla's situation does not fit neatly within the laws of war; on the contrary, the Government's frequent assertion that Padilla is a combatant in an armed conflict is deeply flawed and, ultimately, untenable.

CONCLUSION

The international law justification for Padilla's detention as a combatant is chimerical. If this Court recognizes Padilla as a combatant in an armed conflict – despite his lack of direct participation in combat and his lack of membership in any sort of military force – it will ratify the President's attempt to avoid longstanding and well-settled domestic restraints.

Furthermore, the Government's attempt to harness international law to justify its extraordinary actions runs afoul of the foundational principles of IHL. The rules of

IHL are designed to provide humanitarian limits on nations' behavior in the course of armed conflicts.[33] In this case, the Government twists IHL from a shield into a sword: using it to justify the indefinite detention of Padilla and to circumvent domestic legal requirements. Using IHL, not as a restraint on the use of force, but as a method to access extraordinary domestic powers violates the letter, aims and spirit of IHL.[34]

It may be that the events of September 11, 2001 have inaugurated an era marked by a new breed of conflict. It may be that the laws of war will, in the future, be revised in order to accommodate these changing threats. In the meantime, however, international humanitarian law does not provide parameters for the United States' campaign

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[33] *See The Law of Land Warfare* para. 2; *The Prize Cases*, 67 U.S. (2 Black) 635, 667 (1862) (stating "the laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war").

[34] While the Government grasps for the powers the law of war grants, it simultaneously disregards all of the protections that the law of war requires. For example, the law of war states that all captured combatants must be treated as prisoners of war until a "competent tribunal" determines that they are not entitled to such protection. *See, e.g.*, Third Geneva Convention art. 5; Additional Protocol I art. 45; *The Law of Land Warfare* para. 73; Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997). And yet the Government has given none of its captives in the "war on terror" hearings before "competent tribunals" and has given none of them the protections of prisoner of war status. Nor has the Government complied with numerous other provisions of IHL that provide protection to wartime detainees. *See, e.g.*, Additional Protocol I art. 75(3) (stating "*any* person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken") (emphasis added).

against al Qaeda. The Government cannot simultaneously emphasize both the novelty of the current conflict and claim that its treatment of alleged terrorists is "deeply rooted in the laws and customs of war." (Br. for Pet'r at 28). On the contrary, its treatment of Padilla is unrooted in treaty law, custom, or U.S. historical practice.

The President's designation and subsequent detention of Padilla as a combatant is an unprecedented and unwarranted distortion of the customary law of war. This centuries-old body of law does not support the Government's position, which, indeed, contravenes its underlying principles and careful limitations. If this Court endorses Padilla's indefinite detention without providing him with the constitutional safeguards to which he is entitled, it will not only weaken our domestic protections but will also do considerable violence to an important body of law that protects soldiers, civilians, and all those caught up in the scourge of war.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,

Petitioner,

—v.—

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* ORIGINAL CONGRESSIONAL SPONSORS OF 18 U.S.C. § 4001(A) IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici curiae, current and former Members of Congress, are original sponsors of 18 U.S.C. § 4001(a). They urge this Court to hold that the detention of José Padilla violates the provisions of that Act.[1]

The Hon. John Conyers, Jr. represents the 14th Congressional District of Michigan in the House of Representatives, where he serves as Ranking Member of the House Judiciary Committee. During the 92nd Congress, Congressman Conyers was a Member of Subcommittee 3 of the House Judiciary Committee. He was one of the original sponsors of § 4001(a).

The Hon. Robert F. Drinan represented the 3rd Congressional District of Massachusetts from 1971–1973 and the 4th Congressional District of Massachusetts from 1973–1981. During the 92nd Congress, Father Drinan was a Member of the House Committee on Internal Security and a Member of Subcommittee 3 of the House Judiciary Committee. He was one of the original sponsors of § 4001(a).

The Hon. Robert W. Kastenmeier, a World War II veteran, represented the 2nd Congressional District of Wisconsin in the House of Representatives from 1959–1991. In the 92nd Congress, Mr. Kastenmeier chaired Subcommittee 3 of the House Judiciary Committee and was a primary sponsor of § 4001(a). Mr. Kastenmeier submitted the Committee Report on H.R. 234, the bill later codified at § 4001(a).

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[1] Written consent of all parties to the filing of this brief is on file with the Clerk of the Court. This brief has not been authored in whole or in part by any counsel for a party. No person, other than *amici curiae* and their counsel, has made any monetary contribution to the preparation or submission of this brief.

The Hon. Abner Mikva, a World War II veteran, represented the 2nd Congressional District of Illinois from 1969–1973 and the 10th Congressional District of Illinois from 1975–1979. During the 92nd Congress, Judge Mikva served on Subcommittee 3 of the House Judiciary Committee and was a primary sponsor of § 4001(a). He was appointed to the U.S. Court of Appeals for the D.C. Circuit in 1979 and became Chief Judge in 1991, before stepping down in 1994.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises profound questions about the appropriate balance of power between the Legislature and the Executive regarding the detention of U.S. citizens. The Executive has detained José Padilla, a U.S. citizen, for almost two years, but it has yet to charge him with any crime. Originally arrested on May 8, 2002, Mr. Padilla was seized by civilian authorities inside the United States. On June 9, 2002, the President designated him an "enemy combatant" and ordered him transferred to a military prison in South Carolina. He has remained at that prison ever since. For most of those twenty-two months, Mr. Padilla has been held in complete isolation, barred from communicating with his lawyers, the court, or the outside world in any way. On March 3, 2004, he was allowed to meet with his lawyers for the first time in nearly two years.

On December 18, 2003, the U.S. Court of Appeals for the Second Circuit determined that Mr. Padilla's detention violates 18 U.S.C. § 4001(a), a federal statute governing the detention of U.S. citizens. *See Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003). Passed in 1971, §4001(a) directs that "no U.S. citizen" be detained

"except pursuant to an Act of Congress." The Act codifying § 4001(a) also repealed the Emergency Detention Act of 1950 (EDA), which had granted the Executive limited powers of preventive detention.

Section 4001(a) was an assertion of Legislative over Executive authority. Congress was determined to declare its own primacy in matters concerning the detention of U.S. citizens. As the legislative history makes clear, § 4001(a) was meant to proscribe the detention of U.S. citizens unless and until the power to do so was explicitly grounded in statute. In this, it did not matter whether the Executive acted pursuant to its military or civilian powers.

Amici respectfully request that this Court enforce the unequivocal mandate of § 4001(a). In the face of plain statutory language and clear legislative history, Mr. Padilla's detention cannot be upheld under U.S. law.

ARGUMENT

I. THE TEXT OF 18 U.S.C. § 4001(A) MAKES CLEAR THAT *NO* U.S. CITIZEN MAY BE DETAINED ABSENT STATUTORY AUTHORIZATION

In construing a statute, this Court begins "where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The words Congress employs must be interpreted " 'in accordance with [their] ordinary and natural meaning,' " unless otherwise defined in the statute. *Johnson v. United States*, 529 U.S. 694, 715 (2000) (Scalia, J. dissenting) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute

what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992).

The language of 18 U.S.C. § 4001(a) is simple, direct and unambiguous: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (2000). In enacting these nineteen words, Congress made clear that *no* American citizen could be detained by the United States unless Congress had acted to authorize the detention. The words themselves admit no qualification or exception. No contrary definitions were provided, and no ambiguity exists in the language. Congress's words must be given their ordinary meaning.

This Court has emphasized that when the meaning of a statute is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). In the face of unambiguous language, the "first canon [of statutory interpretation] is also the last: 'judicial inquiry is complete.' " *Conn. Nat'l Bank*, 503 U.S. at 253-54 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). "[P]arties should not seek to amend the statute by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

This Court has already affirmed that § 4001(a) means precisely what it says. *See Howe v. Smith*, 452 U.S. 473 (1981). *Howe v. Smith*, the only Supreme Court case to construe the statute, held that § 4001(a) "proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Id.* at 479 n.3 (emphasis in original). This means that, unless Congress has enacted a statute specifically authorizing Mr. Padilla's detention, the detention is forbidden by law.

Despite this clarity of language, the government now argues that § 4001(a), properly construed, applies much more narrowly than its words direct. *See* Petitioner's Brief at 44-45. According to the government, § 4001(a) does not apply to—and was not intended to apply to—the military's detention of U.S. citizens during wartime.[2] *Id.* Nothing in the statute's text suggests any such limitation, however. On the contrary, the language of § 4001(a) is unequivocal and straightforward in its reach: "*No* citizen" shall be detained "*unless* pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (emphases added).

II. CONGRESS SOUGHT TO PROHIBIT THE CIVILIAN OR *MILITARY* DETENTION OF ANY U.S. CITIZEN ABSENT *EXPLICIT* STATUTORY AUTHORIZATION

This ordinary understanding of the statute's language is fully supported by its legislative history. The legislative history of § 4001(a) makes clear that Congress intended to ensure that no U.S. citizen could be detained without an explicit statutory basis. In this, it did not matter whether the President acted under his military or civilian powers. Congress's intent in enacting H.R. 234—the bill now codified at § 4001(a)—is amply reflected in the Committee Report on the bill, the contemporaneous statements of its sponsors, and the debates on the House and Senate floors.[3] *See* H.R. 234, 92d Cong. (1971).

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[2] The government's argument that the court of appeals' reading of § 4001(a) would preclude the battlefield detention of U.S. citizens, *see* Petitioner's Brief at 48, is addressed below at note 6.

[3] This Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which '[represent] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' " *Garcia v. United States*, 469 U.S. 70, 76 (1984)

A. Congress Realized That Under *The Steel Seizure Case*, Mere Repeal Of The EDA Would Be Insufficient To Achieve This Goal.

The Committee Report on the bill, submitted by the House Committee on the Judiciary, reveals that the purpose of H.R. 234 was "twofold." *See* H.R. REP. NO. 92-116, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1435 ("House Report"). Its first purpose was: "(1) to restrict the imprisonment or other detention of citizens of the United States to situations in which statutory authority for their incarceration exists. . . ." *Id.* Its second purpose was: "(2) to repeal the Emergency Detention Act of 1950," 50 U.S.C. §§ 811-26 (repealed 1971), Title II of the Internal Security Act of 1950, which had granted the Executive limited powers of preventive detention at the outbreak of the Korean War. H.R. REP. NO. 92-116, at 2, *reprinted in* 1971 U.S.C.C.A.N. at 1435-36; *see also infra* Section III.A. The legislative history of H.R. 234 reveals that Congress's second purpose, the repeal of the EDA, provided the impetus behind what was to become its larger first purpose—asserting broad congressional control over the detention of U.S. citizens.

The 92nd Congress acted to repeal the EDA in 1971 out of concern that its scheme of preventive detention was subject to "grave" constitutional challenge. H.R. REP. NO. 92-116, at 4, *reprinted in* 1971 U.S.C.C.A.N. at 1438. But the EDA, whatever its inadequacies, had at least established some affirmative limitations on preventive detention by the Executive Branch. *See infra*

(alteration in original) (citation omitted). The Court has also held that the "remarks . . . of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); *see also Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (such statements "deserve[ ] to be accorded substantial weight . . .").

Section III.B. The Judiciary Committee worried that repeal, standing alone, might leave the field unoccupied and free the Executive of all restraint.

> [T]he Committee believes that it is not enough merely to repeal the Detention Act. The Act, concededly can be viewed as not merely as an authorization for but also in some respects as a restriction on detention. Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation on the limits of executive authority. It has been suggested that repeal alone would leave us where we were prior to 1950.

H.R. REP. NO. 92-116, at 5, *reprinted in* 1971 U.S.C.C.A.N. at 1438.

Unwilling to turn back the clock, given the detention experiences of World War II, the Judiciary Committee added an amendment—the Railsback Amendment—which set forth the language now codified at § 4001(a). "The Committee believes that the imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an Act of Congress, exists." *Id.*

Ironically, the sponsors of H.R. 234 were first alerted to the implications of simple repeal by Congressman Ichord, Chair of the House Committee on Internal Security and the leading opponent of the Railsback Amendment. The Committee on Internal Security had proposed H.R. 19163 (later H.R. 820 in the 92nd Congress), a rival bill that sought to amend, rather than repeal the EDA. *See* H.R. 19163, 91st Cong. (1970). This bill would have retained the EDA's preventive detention scheme, while incorporating additional procedural protections.

In the House Report on H.R. 19163, Congressman Ichord warned his fellow representatives that simple

repeal might grant even more power to the Executive. *See* H.R. REP. NO. 91-1599, at 12 (1970). He reminded his colleagues

> of the unfortunate occurrence during World War II when the President, in the exercise of his war powers and without congressional restraint, detained persons of Japanese ancestry on a group basis without regard to their status as American citizens and without regard to the question of individual loyalty, an action which in our opinion, at least in hindsight, must be regarded as a dark day in our history. Surely, a consideration of the fact that a repeal of the act removes all restraints on the Executive and would return us to the status existing in World War II should give us pause.

Id. Congressman Ichord reemphasized these points during the floor debate on H.R. 234 and suggested that his proposal to amend the EDA was therefore more "libertarian" than a proposal for outright repeal. 117 CONG. REC. 31,546 (1971). He also noted that it was only after he raised these issues that the House Judiciary Committee "went to work and they came up with the Railsback Amendment." *Id.*

Congressman Railsback described the genesis of his Amendment in similar terms. During the Judiciary Committee hearings, "it became apparent that what was said in the Internal Security report might be true." *Id.* at 31,549. The sponsors on the Judiciary Committee realized that with repeal alone,

> we would not be correcting what happened in the year 1942 when the citizens were rounded up . . . .
>
> . . . [T]he Committee on the Judiciary felt that it would be wise not only to repeal title II but to try to do something about what occurred in 1942 through

> President Roosevelt's Executive Order. So we came up with an amendment that says:
>
> > No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
>
> In other words, an Executive has to have some kind of congressional authorization before he can detain a citizen.

Id. at 31,549-50.

This analysis of simple repeal, by opponents and sponsors of H.R. 234 alike, was informed by their careful consideration of this Court's decision in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). As the Report of the Committee on Internal Security noted:

> [The *Youngstown*] decision teaches that where the Congress has acted on a subject within its jurisdiction, sets forth its policy, and asserts its authority, the President might not thereafter act in a contrary manner . . . .
>
> The question then is whether Congress shall express itself upon this subject, or whether it shall wipe the slate clean of such restraints as are now imposed on the executive power by the Emergency Detention Act of 1950.

Id. at 31,551 (quoting the Internal Security Report) (alteration in original).

Although the Committee on Internal Security had raised this question in connection with its own bill to amend the EDA, Congressman Railsback quoted back this language during the floor debate in support of his own Amendment. *See id.* He did so to emphasize that Congress did have the authority under *Youngstown* to

affirmatively prohibit Executive detention in wartime without the "prior consent of the Congress":

> To those who would view such a prohibition as in derogation of the Executive's wartime powers, I would refer them to the *Youngstown* steel seizure cases—343 U.S.C. [sic] 579—where the Supreme Court indicated even though a President might have broad wartime powers, they may be limited by acts of Congress.

Id. Given that the sponsors of H.R. 234 had determined that "[n]either modification nor repeal" of the EDA could "remove what amounts to a national disgrace," Congressman Railsback urged his fellow Members to enact the broad affirmative prohibition provided for in H.R. 234. *Id.* They did so on September 16, 1971, by a vote of 356-49.[4] *Id.* at 31,781.

B. Congress Endorsed The Broad Scope Of The Railsback Amendment And Understood Its Reach To Include Military Detentions In Wartime.

The language of the Railsback Amendment was debated extensively on the House floor, and the exchanges between the sponsors and opponents of H.R. 234 illustrate a Congress fully aware of the implications of the language used. Contrary to the government's position, Congress understood that the language of the proposed amendment was to apply to the military detention of citizens during wartime.

[4] The Senate adopted the Railsback Amendment on September 16, 1971. Just before the measure came up for a vote, Senator Daniel Inouye, the primary sponsor of the Senate's companion bill to H.R. 234, urged his fellow Senators to vote for the language of the Railsback Amendment, characterizing the provision as "a valuable addition to my bill." 117 CONG. REC. 32,145 (1971).

Congressman Ichord led the fight against the Railsback Amendment, which he termed "this most dangerous committee amendment." *Id.* at 31,544. On the House floor, he warned that the Railsback Amendment

> would deny to the President the means of executing his constitutional duties, and could have the effect of rendering him helpless to cope with the depredations of those hard-core revolutionaries in our midst who, in the event of war, may be reasonably expected to attempt a widespread campaign of sabotage and bloodletting, including the assassination of public officials, in aid of the enemy.

Id.[5]

Congressman Ichord pressed Congressman Railsback on this point, asking whether the sponsors of H.R. 234 would really deny the President the authority to preventively detain U.S. citizens in wartime. The following exchange—in which Congressman Railsback emphasized that the President had other means at his disposal—illustrates that Congress fully explored the ramifications of the Railsback Amendment:

> Mr. ICHORD: . . . Does the gentleman believe that in this country today there are people who are skilled in espionage and sabotage that might pose a possible threat to this Nation in the event of a war with nations of which those people are nationals or citizens?

[5] Congressman Williams, another opponent of the Railsback Amendment, cautioned his colleagues in similar terms:

> . . . I do not want to see the President's hands tied by the language of the Kastenmeier subcommittee proposal which would require an act of Congress before any likely subversive or would-be saboteur could be detained.

Id. at 31,544.

Mr. RAILSBACK: Yes.

Mr. ICHORD: Does the gentleman believe then that if we were to become engaged in a war with the country of those nationals, that we would permit those people to run at large without apprehending them, and wait until after the sabotage is committed?

Mr. RAILSBACK: I think what would happen is what J. Edgar Hoover thought could have happened when he opposed [the detention of Japanese-Americans] in 1942. He suggested that the FBI would have under surveillance those people in question and those persons they had probable cause to think would commit such actions.

Id. at 31,551-52.[6]

[6] In addition to arguing that there were means other than preventive detention at the Executive's disposal, the sponsors of § 4001(a) emphasized that the Railsback Amendment did not (and could not) impinge on the President's inherent powers, *if* the President had any inherent power to detain U.S. citizens. Congressman Abner Mikva noted, "If there is any inherent power of the President . . . to authorize the detention of any citizen of the United States, nothing in the House bill that is currently before this Congress interferes with that power, because obviously no act of Congress can derogate the constitutional power of a President." *Id.* at 31,555.

In its brief, the government argues that the Second Circuit's construction of § 4001(a) raises "serious constitutional questions" as it "would preclude the military's detention even of an American citizen seized while fighting for the enemy in the heat of traditional battlefield combat." Petitioner's Brief at 48. Even if the government was correct, however, these facts are not presented by this case. Mr. Padilla was not seized on a "traditional battlefield," foreign or domestic. He was arrested by civilian authorities at Chicago's O'Hare Airport. The military became involved a month later, when military personnel seized Mr. Padilla from his civilian jail cell in New York, and transferred him to a military brig.

Congressman Ichord also denounced the Railsback Amendment as impractical, arguing that Congress might not be able to move quickly enough in times of crisis:

> But this is the nuclear age. We cannot expect an enemy to hold to the ancient etiquette of war by making formal declarations before undertaking their attack. In this nuclear age we should not expect to be forewarned. Nor is it likely that Congress will be able to sit. If it cannot sit, it cannot legislate. Under no circumstances, therefore, can we afford the luxury of an amendment, which is so clearly unwise, unnecessary, and dangerous.

Id. at 31,545.

The sponsors of H.R. 234 pushed back. Congressman Mikva, one of its primary sponsors, stated that in his view, the EDA was "an unwarranted delegation of unnecessary power" to the President. *Id.* at 31,566. He emphasized that in a future crisis, he would rather "leave it to the Congress to judge under what circumstances an American citizen should be detained." *Id.* He explained to his fellow Members:

> By repealing the statute, Congress would terminate the President's ability to incarcerate people whenever he determines that an emergency exists. It would be Congress['s] responsibility to restore that power to the President if necessary, along with whatever other emergency powers he might require, in the event that Congress found a state of emergency to exist. It is difficult to envision a situation in which the President would need this particular kind of authority on an emergency basis without even the 24 hour notice which would be necessary for Congress to act.

Id. at 31,557.

Contrary to Congressman Ichord's assertions, Congressman Railsback explained that H.R. 234 would not prevent the President from acting in a situation of martial law—at a time when the "processes of government cannot function in an orderly way." *Id.* at 31,755. He emphasized that the Supreme Court had explicitly "noted this exception in *Ex parte Milligan*," a Civil War case holding that civilians may not be tried by military tribunal unless the civilian courts are closed and obstructed under the proper application of martial law. *See* 71 U.S. (4 Wall.) 2, 127 (1866) (noting that "[m]artial rule can never exist where the courts are open" and "capable of administer[ing] criminal justice according to law"). Congressman Railsback explained that, as long as Congress and the courts were able to function, Congress could properly limit the Executive's military detention authority under *Youngstown* and under "article I, section 8 of the Constitution." 117 CONG. REC. 31,755 (1971).

Thus, Congress understood the language of § 4001(a) to generally include (and to bar) military detention of U.S. citizens in wartime. That understanding is made even more explicit elsewhere in the legislative history. For example, in emphasizing that his Amendment sought to prevent the recurrence of World War II detentions, Congressman Railsback noted that Japanese-Americans were held "under the 1942 Executive order, which incidentally delegated authority to the military instead of civilians to execute the order." *Id.* at 31,552. Congressman Ichord—in condemning the World War II detentions—explained that President Roosevelt had issued Executive Order 9066 under his Commander-in-Chief powers, and had delegated authority under the Order to "the Secretary of War and the military commanders who

he may from time to time designate."[7] H.R. REP. NO. 91-1599, at 8.

Ignoring this legislative history, the government argues that Congress did not intend for § 4001(a) to apply to military detentions, because the detention of Japanese-Americans was "administered by a civilian agency, the War Relocation Authority, *not by the military*." Petitioner's Brief at 46 (emphasis in original). Although it is true that the civilian War Relocation Authority (WRA) was created to administer the relocation centers,[8] the restrictive powers of the WRA were delegated to it by Lt. General John De Witt, Military Commander of the Western Defense Command. *See Ex parte Endo*, 323 U.S. 283, 289 (1944). As the official designate of the Secretary of War, General De Witt was responsible for carrying out the duties prescribed by Executive Order 9066. *Id.* at 286. It was General De Witt who issued the orders that prevented evacuees from leaving the relocation centers. *See id.* at 289 (noting that General De Witt promulgated a series of restrictive

---

[7] The authority for the World War II detentions stemmed from Executive Order No. 9066, issued on February 19, 1942. *See Ex parte Endo*, 323 U.S. 283, 285-98 (1944).

[8] The Director of the War Relocation Authority explained that it "was established for the primary purpose of relieving military establishments of the burden of providing for the relocation of persons excluded from military areas by order of the Secretary of War or by designated military commanders acting pursuant to Executive Order No. 9066, dated February 19, 1942." *See War Relocation Centers: Hearing on S. 444 Before Subcomm. of Senate Comm. on Military Affairs*, 78th Cong. 61 (1943) [hereinafter *War Relocation Hearings*] (testimony of Dillon S. Myer, Director of the War Relocation Authority). The relocation centers were set up only after "it was found necessary to take care of these people who were moved out [of military exclusion zones], until we could work out another program for them." *Id.* at 47.

orders prohibiting the evacuees from leaving relocation centers "except pursuant to an authorization from General De Witt's headquarters"). "By letter of August 11, 1942, General De Witt authorized the War Relocation Authority to issue permits for persons to leave these areas. By virtue of that delegation . . . the War Relocation Authority was given control over the ingress and egress of evacuees from the Relocation Centers." *Id.* at 290.

Even then, the military continued to play an important role with respect to the relocation centers. The perimeters of the centers were patrolled not by civilian officials, but by Army soldiers, who checked "the passes of people going in and of people coming out." *War Relocation Hearings, supra*, at 6 (1943) (testimony of Dillon S. Myer, Director of the WRA). And during any internal disturbance, it was understood that "the military police [were] called in by the director [of the WRA] and given full charge during that period of disturbance." *Id.*

Furthermore, not all Japanese-Americans were held at relocation centers. Some were detained at domestic "internment camps," which were run by the Army. *Id.* at 39. Any person of Japanese descent (combatant or civilian) who was determined to be disloyal was transferred from a relocation center to an Army internment camp, where he or she was held for the duration of the conflict.[9] *Id.* Although the Army interned non-citizens without prior judicial procedure, U.S. citizens could be interned in these Army camps if (and only if) they were "proven subversive on being put through the court procedure, but only through that process." *Id.* at 40. Thus,

[9] In his Senate testimony, Director Myer emphasized that "prisoners of war" and "proven enemies" were held in Army internment camps, not WRA relocation centers. *Id.* at 45.

contrary to the government's arguments, it simply cannot be maintained that the detention of Japanese-Americans in World War II was "administered by civilian authority," to the exclusion of the military.

And of course, Members of Congress understood that the EDA itself had been enacted to cope with the threat of domestic espionage and sabotage during a "war-related emergency." H.R. REP. NO. 91-1599, at 4. The EDA was passed at the outbreak of the Korean War in response to fears that dissident American Communists might seek to sabotage the war effort at home. *See infra* Section III.A. The EDA operated both as an authorization for and restriction upon the preventive detention of U.S. citizens. *See* H.R. REP. NO. 92-116, at 2-3, *reprinted in* 1971 U.S.C.C.A.N. at 1436. The Executive could detain citizens under the Act only pursuant to warrants issued by the Attorney General and only if there was "reasonable ground to believe" that the suspects might engage in acts of sabotage or espionage. 50 U.S.C. § 813(a) (1970). Any suspect so detained had the right to administrative and judicial review of the Attorney General's decision. *See id.* §§ 814-21; *see also infra* Section III.B.

Seeking to create a distinction between military and civilian detention where none exists, the government emphasizes that the EDA delegated detention authority to a "civilian official." Petitioner's Brief at 46. Although it is true that the EDA authorized the President to "act[ ] through the Attorney General," 50 U.S.C. § 813(a), the Executive could not have sidestepped the EDA's procedural requirements by ordering that citizens be detained under military, rather than civilian authority. The EDA was intended to regulate preventive detention and limit Executive discretion. *See, e.g.*, Richard Longaker, *Emergency Detention: The Generation Gap, 1950-1971*, 27

W. POL. Q. 395, 396 (1974) ("At a minimum, the [EDA] presumed that short of the invocation of martial law, the use of unfettered discretion by the President in a wartime emergency had died with World War II.").[10] By directing that the Executive act "through the Attorney General," the EDA in effect barred the preventive detention of U.S. citizens by the military.

C. Congress Intended To Proscribe Any Detention Of A U.S. Citizen Not Explicitly Grounded In Statute.

Congress did not believe that a general statute—one that did not explicitly confer detention authority on the Executive—would be enough to satisfy the demanding language of the Railsback Amendment. The evolution of that language makes clear that the sponsors of H.R. 234 envisioned that any enabling statute would have to deal specifically with the Executive's authority to detain.

Initially, the language of H.R. 234 provided that no one could be imprisoned or detained except in conformity with the provisions of Title 18 of the U.S. Code. During the Subcommittee hearing on the bill, however, Robert Mardian, appearing on behalf of the Department of Justice, pointed out that this falsely "assume[d] that all provisions for the detention of convicted persons are contained in title 18." *Prohibiting Detention Camps: Hearings on H.R. 234 and Related Bills Before Subcomm. 3 of the House Comm. On the Judiciary*, 92d

[10] The EDA was "the brainchild of a group of beleaguered liberal senators caught in a rising wave of intense anticommunism," who had been offended by "the dragnet procedures of 1942" and considered the EDA "an improvement." Longaker, *supra*, at 395-96 (1974). In the debates on H.R. 234, Congressman Ichord emphasized that the EDA had been introduced by Senators whose "libertarian credentials" no-one could question. *See* 117 CONG. REC. 31,542 (1971).

Cong. 73 (1971) [hereinafter *H.R. 234 Hearings*] (statement of Robert Mardian, Assistant Attorney General, Internal Security Division, DOJ). Mr. Mardian emphasized that other titles of the U.S. Code also contained detention provisions, and that H.R. 234, as written, might unintentionally suggest that Congress wanted to repeal all those other provisions. *Id.* at 76.[11]

The Subcommittee considered various solutions to this problem, including the possibility of enumerating all such titles within the text of H.R. 234.[12] But Congressman Railsback devised a simpler solution, and Subcommittee 3 amended H.R. 234 with the broader language of

[11] For example, the following exchange occurred:

> Mr. MIKVA: The gentleman is correct that presently they are scattered. Would not the Department's concern though, be allayed if sections 1 and 2 were amended to require conforming with the procedure specified in this title, title 21, title 50, and so forth?
>
> Mr. MARDIAN: I am not convinced that we have all the titles.
>
> Mr. CONYERS: I am not either.
>
> Mr. MIKVA: But you understand it was not a procedure concern.
>
> Mr. MARDIAN: I think that is clear. I don't think there was any intention to repeal the authority of the Government or the President to commit people convicted of crimes other than those contained in title 18.
>
> Mr. CONYERS: I am glad to hear the gentleman make that statement for the record.

H.R. 234 Hearings, *supra*, at 76.

[12] Among the provisions unintentionally excluded by the original language of H.R. 234 were those that provided for circumstances in which the *military* could detain and try a U.S. citizen accused of spying. *See* 10 U.S.C. §§ 906–906(a). Mr. Mardian's intervention ensured this did not happen, preserving detention authority for the military and further undermining the government's claim that § 4001(a) was not intended to cover military detentions. *See supra* Section II.B.

his proposal. At no point did any of the sponsors suggest that the Railsback Amendment might expand the permissible range of enabling statutes beyond those dealing specifically with detention.

But this possibility was raised—and discounted—on the House floor. In a particularly telling exchange, Congressman John Ashbrook, a supporter of the rival bill, H.R. 820, claimed that the Railsback Amendment, although meant to restrict Executive authority, would actually "open up the President's power." 117 CONG. REC. 31,547 (1971). He warned his colleagues that Congress had already enacted "many statutes" authorizing the President to declare a national emergency, and suggested that in such an emergency, the President might seek to carry out preventive detentions using this general statutory authority. *Id.* He emphasized:

> I, for one, would feel very much better if all of the written restraints in H.R. 820 were on the books, operating to restrain the President, operating to prevent the President from the abuse of power under a declaration of national emergency . . . .
>
> . . . [With the Railsback Amendment,] [e]very declaration of emergency, I say to my fellow Members here, would come from an act of the Congress which would be the enabling act and which would give the President the precise power that we are here trying to check.

Id. at 31,548.

No other Member of Congress supported this analysis, however. Congressman Ichord, the primary sponsor of H.R. 820, took pains to contradict Congressman Ashbrook on this point:

> Madam Chairman, I would say to the gentleman from Ohio [Mr. Ashbrook] that I do not entirely

> agree with the gentleman. I do feel that the language of the amendment drafted by the gentleman from Illinois [Mr. Railsback] would prohibit even the picking up, at the time of a declared war, at the time of an invasion of the United States, a man whom we would have reasonable cause to believe would commit espionage or sabotage.

Id. at 31,549. But Congressman Ashbrook went on to suggest that the Railsback Amendment granted no more protections to U.S. citizens than had been available to Japanese-Americans during internment. Congressman Railsback ended the exchange by making clear that this was the whole point of his Amendment:

> Mr. ASHBROOK: . . . I would certainly point out to my friend, the gentleman from Illinois, the right to a trial by jury is not new. It was available to those people in 1941 and 1942. The only exception was that they did not get it.
>
> Mr. RAILSBACK: That is right; they did not get their constitutional rights.
>
> Mr. ASHBROOK: There is no guarantee. From what the gentleman is saying, he thinks there would be these guarantees in the future. The same laws were on the books. The same Constitution was operating. They did not get it. How can he say they would get it now?
>
> Mr. RAILSBACK: Because we are saying in here that detention cannot occur unless pursuant to an act of Congress.

Id. at 31,552. Following on this discussion, Congressman Robert Eckhardt, a supporter of H.R. 234, emphasized to his colleagues that contrary to Congressman Ashbrook's remarks: "You have got to have an act of

Congress to detain, and that act of Congress must authorize detention . . . ." *Id.* at 31,555.[13]

III. THE PROTECTIONS AFFORDED MR. PADILLA FALL FAR SHORT OF PROTECTIONS ONCE AVAILABLE UNDER THE EDA

Despite the plain language and clear legislative history of § 4001(a), Mr. Padilla has already been held in preventive detention for nearly two years. In that time, the Executive has denied him the most basic of procedural protections. The conditions of Mr. Padilla's confinement fall far short of the protections that were once available under the EDA, the statute repealed in 1971 for procedural inadequacies.

A. Congress Repealed The EDA Over Concerns About Its Due Process Failings.

The EDA, enacted as Title II of the Internal Security Act of 1950, "established procedures for the apprehension and detention, during internal security emergencies,

[13] As noted in the court of appeals' opinion, however, the plain language of the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), "contains no language authorizing detention," particularly "the detention of American citizens captured on United States soil." *Padilla*, 352 F.3d at 722. In addition, 10 U.S.C. § 956(5), a commonplace appropriations statute, authorizes "nothing beyond the expenditure of money," and is therefore insufficient both under § 4001(a) and *Ex parte Endo*, 323 U.S. at 304 n. 24. *See Padilla*, 352 F.3d at 724. In *Ex parte Endo*, this Court held that an appropriations statute must contain language "plainly" authorizing the precise authority claimed. 323 U.S. at 304 n. 24. There is no such language here.

The government's interpretation of § 956(5) would have rendered § 4001(a) moot *ab initio*. Similar language appeared in a World War II appropriations statute used to fund the detention of Japanese-Americans, *see* Military Appropriation Act, 77th Cong., ch. 591, tit. III, § 103, 55 Stat. 810, 813-14 (Dec. 17, 1941). Given that § 4001(a) was meant to bar a recurrence of World War II preventive detention, the 92nd Congress clearly did not mean for the old but surviving appropriations language to constitute explicit authorization under § 4001(a).

of individuals deemed likely to engage in espionage or sabotage," if there was "reasonable ground to believe" that they would "probably" do so. *See* 50 U.S.C. § 813 (1970) (repealed 1971). Congressman Spark Matsunaga, a primary sponsor of § 4001(a), explained that Congress enacted the EDA over President Truman's veto "in the then prevalent atmosphere of the Korean conflict, when being 'soft on communism' was thought by many to be treasonable." 117 CONG. REC. 31,571 (1971). Congressman Chet Holifield, another sponsor of § 4001(a), emphasized that the EDA was "passed during a time of great national hysteria and uncertainty":

> We heard wild accusations of Communists in Government, and witnessed spectacular trials of members of the Communist Party, espionage agents, and conspirators. The terms "fifth column," "fellow traveler," and "soft on communism" filled every newspaper and broadcast. Any Congressman or public official who spoke in defense of basic human or constitutional rights was labeled a Communist sympathizer.

Id. at 31,566.

According to Congressman Matsunaga, the EDA was "more or less forgotten" as the "hysteria of anticommunism of the early 1950's" began to wane. *Id.* at 31,572. It was forgotten, that is, until "about 3 years ago [in 1968]," when "rumors were rampant that the Government was again preparing detention camps . . . for dissidents, activists, militants, and others with whom those in control of the Government might disagree." *Id.* Congressman Mikva explained that these rumors had been sparked by a "1968 report of the House Committee on Un-American Activities (now House Internal Security Committee)," which "recommended using the detention camps provided for by Title II" for certain black nation-

alists and Communists. *H.R. 234 Hearings*, *supra*, at 42; *see also* 117 CONG. REC. 32,144 (1971).

As the House Report reveals, the EDA had become a profound concern for Congress by 1971:

> Although no President has ever used or attempted to use these provisions, the mere continued existence of the Emergency Detention Act has aroused much concern among American citizens, lest the Detention Act become an instrumentality for apprehending and detaining citizens who hold unpopular beliefs or views.

H.R. REP. NO. 92-116, at 2, *reprinted in* 1971 U.S.C.C.A.N. at 1436. In response to these concerns, the House Committee on Internal Security wanted to amend, rather than repeal the EDA. *Id.* But "more than 157 Members of the House" sponsored or cosponsored bills calling for outright repeal. *Id.*

In unanimously endorsing H.R. 234, the House Judiciary Committee determined that the EDA was "beyond salvaging, [could] not be adequately amended, and should be repealed in toto." *Id.* at 1438. Its members concluded that the Act served "no useful purpose," but only "engender[ed] fears and resentment on the part of many of our fellow citizens." *Id.* at 1437. They also emphasized that its scheme of preventive detention was subject to "grave" constitutional challenge, in large part because of "inadequate" judicial review and other due process failings. *Id.* at 1438.

In advocating for the repeal of the EDA, the sponsors of H.R. 234 highlighted the EDA's glaring procedural deficiencies. Congressman Railsback warned that the EDA raised "serious constitutional questions." 117 CONG. REC. 31,550 (1971).

> The person detained is not brought before an impartial judge but before a "preliminary hearing officer" appointed by the prosecution. . . .
>
> And how, under such procedures, does a detainee prove his innocence. How does he defend the vague charge that someone believes he will commit a criminal act sometime in the future?
>
> At both the hearing and review board level, the detainee is deprived of substantial due process guarantees. There is no right to jury trial. The right to be appraised of the grounds on which detention was instituted or of the full particulars of the evidence, the right to confront one's accusers, and the right to cross-examine witnesses, are all severely limited if, in the Attorney General's—not a court's—opinion, to divulge information would be dangerous to national security.

Id. at 31,550-51.

The Senate was in full agreement on the need for repeal of the EDA. Senator Inouye, the primary sponsor of S. 592 (the Senate's companion bill to H.R. 234), highlighted the fallout from the House Un-American Activities Report, for example, and stressed that the EDA's preventive detention scheme was "at odds with normal judicial procedure." 117 CONG. REC. 32,144 (1971). He warned that the EDA transformed "the presumption of innocence [into] a presumption of guilt for the accused" and urged his fellow Senators to repeal this "definite threat to every American's freedoms and constitutional rights." *Id.* at 32,144-45.

B. Mr. Padilla Has Been Afforded Far Fewer Due Process Protections Than The EDA Would Have Provided.

Even the EDA would have granted Mr. Padilla more due process protections than the Executive is now willing to provide. Under the EDA, a detainee was to be brought before a preliminary hearing officer within 48 hours of his detention or as "soon thereafter as provision for it be made." 50 U.S.C. § 814(d) (1970). At this preliminary hearing, the detainee was to be advised of his right to counsel and informed of the grounds for the detention. *Id.* § 814(d)(1) and (2). Although the Attorney General could withhold evidence on national security grounds, the detainee was permitted to present evidence on his own behalf and to cross-examine the witnesses who appeared against him. *Id.* § 814(d)(5). The EDA also directed that a written record of the proceeding be kept. *Id.*

If the hearing officer upheld the detention, a detainee had the right to appeal that decision, first to a Detention Review Board and then to the federal courts. *Id.* §§ 815-21. The Detention Board was to have consisted of nine members, appointed by the President with the advice and consent of the Senate. *Id.* § 815. The detainee was entitled to "a full hearing before the Board with all the rights normally accorded in courts of law, including the full opportunity to be represented by counsel, the right at hearings of the Board to testify, to have compulsory process for obtaining witnesses in his favor, and to cross-examine adverse witnesses." H.R. REP. NO. 91-1599, at 5. The detainee was also entitled to learn the particulars of the evidence against him, except to the extent that the Attorney General determined that providing this information would harm national security. *Id.* If the Board denied relief, further appeal was allowed to

the appropriate federal appeals court and eventually to the U.S. Supreme Court. 50 U.S.C. § 821. The EDA also specified that "nothing contained in this Title shall be construed to suspend or authorize the suspension of the privilege of the writ of habeas corpus." *Id.* § 826.

Mr. Padilla has not been afforded due process protections in any way comparable to those provided by the EDA—the same EDA that Congress deemed inadequate. Mr. Padilla has not been allowed to attend any hearing, confront any witness or present evidence on his own behalf. Until recently, he was barred from all communication with his court-appointed attorneys. According to the Executive, he is now permitted access to counsel only as a matter of Executive discretion.[14]

C. Even The Internal Security Committee Bill That Was Rejected As Inadequate In 1971 Would Have Provided Further Protections For Mr. Padilla.

H.R. 820, the rival Internal Security Committee bill which sought to amend (rather than repeal) the EDA, would have at least incorporated more protections into the statute. The bill would have granted detainees financial support in securing the assistance of counsel, as well as assistance in obtaining investigative, expert, or other services necessary for their defense. H.R. REP. NO. 91-1599, at 2. The bill also would have narrowed the grounds under which the EDA could have been invoked. *Id.* The EDA, as adopted in 1950, authorized the preventive detention of citizens in the event of: (1) an invasion; (2) a declaration of war by Congress; or (3) an insurrection within the United States in aid of a foreign enemy. *See* 50 U.S.C. § 812. H.R. 820 would have sig-

[14] United States Department of Defense, "News Release: Padilla Allowed Access to Lawyer," Feb. 11, 2004.

nificantly limited this third category by requiring that any determination of an insurrection be made by concurrent resolution of Congress. H.R. REP. NO. 91-1599, at 2.

But Congress rejected H.R. 820 as inadequate. Members of Congress decided that the bill did not (and could not) go far enough.[15] Congressman Emanuel Celler, Chair of the House Judiciary Committee and a co-sponsor of H.R. 234, expressed this directly to Congressman Ichord:

> The distinguished gentleman from Missouri (Mr. Ichord) . . . seeks to make the retention substitute more palatable by sugar coating it with some procedural changes. However, there is an old saying that you cannot make a purse of silk out of a sow's ear. You might be able to put a dog's tail in a mold, but you cannot make the dog's tail straight. Try as hard and as sincerely as the gentleman from Missouri will—and he is sincere—he cannot remove the evil out of the substitute. He can change the label, but he cannot change the contents of the bottle.

117 CONG. REC. 31,553 (1971).

In line with these sentiments, Congress rejected H.R. 820 in favor of the broad prohibition against preventive detention now codified at § 4001(a). Despite this, Mr. Padilla has been held in preventive detention for twenty-two months under conditions that fall far short of the due process protections provided for in the EDA itself.

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[15] Congressman Robert F. Drinan, a co-sponsor of H.R. 234, argued that H.R. 820, like the EDA, was "defective in procedural safeguards" and emphasized that the amendments proposed "would leave untouched the heart of the law." 117 CONG. REC. 31,778-79 (1971).

CONCLUSION

For all the foregoing reasons, *Amici* respectfully request that the Court affirm the judgment of the court of appeals.

Respectfully submitted,

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DONALD H. RUMSFELD, SECRETARY OF DEFENSE,

Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
as Next Friend of Jose Padilla,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE CATO INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore limited constitutional government and secure those constitutional rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with the courts. Because the instant case raises vital questions about the power of government to deprive citizens of their liberty, hold them incommunicado, and severely limit their access to the courts to seek redress, the case is of central concern to Cato and the Center.

STATEMENT OF THE CASE

The prisoner in this case, Jose Padilla, is an American citizen. He is presently confined in a military brig in the United States. A petition for a writ of habeas corpus has been filed on his behalf and that petition alleges that Mr. Padilla's imprisonment is contrary to law.

[1] The parties' consent to the filing of this *amicus* brief has been lodged with the Clerk of this Court. In accordance with Rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation of this brief.

The Government claims that Mr. Padilla is an "enemy combatant" who is "closely associated" with the al Qaeda terrorist organization. Mr. Padilla was arrested by federal government agents upon his arrival at Chicago's O'Hare International Airport after a flight that originated in Pakistan. A few weeks later, President Bush issued an order to his Secretary of Defense "to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant." Pursuant to that presidential order, Mr. Padilla was taken to a military brig in Charleston, South Carolina.

For almost two years, the Government has denied Mr. Padilla any access to legal counsel. The Government claims that the Executive has plenary power to identify "enemy combatants" and to hold them incommunicado indefinitely. Because it is physically impossible for a prisoner in such circumstances to file a writ of habeas corpus, an attorney must file a "next friend" petition on the prisoner's behalf. The Government contends that such petitions must be "properly filed" even though the attorney has not been able to meet with the prisoner to discuss the Government's allegations. The Government also maintains that properly filed petitions should be summarily dismissed if the prisoner has been deemed by the Executive to be an "enemy combatant."

SUMMARY OF ARGUMENT

Since the September 11th terrorists attacks, the Federal Government has made several sweeping constitutional claims – that the Executive can seize American citizens, place them in solitary confinement, deny any and all visitation (including with legal counsel), and, in effect,

deny the prisoner access to Article III judges to seek the habeas "discharge" remedy. As long as the Executive has issued "enemy combatant" orders to his Secretary of Defense, the Government claims, the process comports with the Constitution – regardless of whether the prisoner is an American citizen or whether the arrest-seizure takes place overseas or on American territory. Repeatedly, the Government conflates three distinct issues: seizure of citizens, imprisonment of citizens, and trial of citizens.

The main problem in this case is that the Court of Appeals, Petitioner, and Respondent have all operated on the erroneous assumption that Jose Padilla was seized "on American soil." That mistake of law has opened the door to a host of other issues that may not be properly presented in this case. *Amicus Curiae* respectfully submits that both Petitioner and Respondent have overstated the strength of their respective legal positions. The prisoner, Jose Padilla, is correct insofar as he maintains that he must be able to meet with counsel in order to respond to the Government's allegations during habeas proceedings. On the other hand, the Government is correct insofar as it maintains that formal criminal charges are not necessary to confine Mr. Padilla in a prison facility. If the Government can persuade an Article III judge that Mr. Padilla is indeed an "enemy combatant," his confinement in a military brig would be lawful. 18 U.S.C. § 4001 does not apply to Mr. Padilla because he was taken into custody at an international airport, which is the functional equivalent of the border. Section 4001 only applies to citizens taken into custody within the border. This Court should reverse the

ruling below and remand this case for further proceedings.[2]

ARGUMENT

The power of the Executive to seize and imprison can vary – depending on where the citizen is seized. When the citizen is seized at the border, the government's power to detain is limited, but only by the requirements of meaningful habeas review (which has not yet been granted in this case). When the citizen is seized on U.S. territory, more demanding requirements must be met

Part I describes the power of the Executive to seize and detain citizens outside American borders. Part II describes the power of the Executive to seize and detain on U.S. territory. And Part III will argue that Mr. Padilla's seizure ought to be governed by the rules of extra-territorial seizures – because Mr. Padilla was seized on the border (as a matter of law), not on U.S. territory.[3]

[2] *Amicus Curiae* believes the Court of Appeals for the Second Circuit properly concluded that the district court has jurisdiction over the proper respondent. *Amicus Curiae* will not burden this Court by repeating the arguments on those issues here.

[3] The instant case does not involve a non-citizen and does not involve prosecution and trial matters. Thus, *Amicus Curiae* will not burden the Court with a discussion of those issues here.

I. THE POWER OF THE EXECUTIVE TO SEIZE AND IMPRISON CITIZENS OUTSIDE AMERICAN BORDERS

A. SEIZURE

There can be no doubt that the al Qaeda terrorist network is much more dangerous than a band of criminal outlaws. It is no overstatement to say that al Qaeda is an armed foreign force that is waging war on America. Al Qaeda terrorists not only engage in war-like acts, they are primarily interested in perpetrating *war crimes*. As the vicious attacks of September 11th demonstrated, innocent victims are not regarded as "collateral damage" – rather, al Qaeda's objective is to murder as many innocent civilians as it possibly can. The President's responsibility to defeat this enemy organization and to protect the citizenry is made more difficult by the fact that this foe cannot be located on a map; it is not a nation-state. Al Qaeda operatives impersonate civilians – they dress in civilian garb and pose as college students, tourists, and businesspeople – and they travel widely.

Given the unusual character of this war, it is appropriate for the judiciary to afford the President a measure of deference in the exercise of his executive authority and as Commander in Chief. When the U.S. military is sent abroad to vanquish terrorist training camps, soldiers have the authority to capture and detain both enemy personnel and their collaborators. This Court has never held that arrest warrants are required in the battlefield. Although the Government complains in general terms about attempts to "impair" Executive authority, it notably fails to identify any legal challenge to the *capture* of enemy forces outside of America's borders. The Government, in short, builds a convincing case against a classic straw man when

it argues that the military must have latitude to *seize* combatants, including combatants who turn out to have been born in America.[4]

B. IMPRISONMENT

When the Government seeks to *imprison* an American citizen, another set of legal issues comes to the fore. It is sensible to afford military authorities some deference with respect to the capture and brief detention of enemy personnel, but it is another matter when the Executive has made a determination to imprison an American citizen without formal criminal charges. As the Court of Appeals for the Second Circuit observed, once a person has been confined to a jail cell, any immediate threat that he may have posed has been effectively neutralized. *See Padilla v. Rumsfeld*, 352 F.3d 695, 700 (2d Cir. 2003). If the Government determines that an American citizen must be deprived of his liberty because he poses a threat to public safety, it must be prepared to defend that assessment in a court of law. *See In re Territo*, 156 F.2d 142 (9th Cir. 1946) (habeas petition considered and subsequently denied).

The Court of Appeals for the Fourth Circuit recently noted that American citizenship entitles a prisoner "to file

[4] If the purpose of the straw man is to confuse the general public, it may have succeeded. Many people are under the mistaken impression that the President's authority to take prisoners of war is under legal assault in the *Hamdi* litigation. However, counsel for Yaser Hamdi has made it clear that Hamdi's initial capture is *not* an issue. See Brief for Petitioners, *Hamdi v. Rumsfeld* (No. 03-6696) at 10 ("Hamdi's habeas petition challenges his indefinite detention – not his initial seizure by the Northern Alliance or transfer to U.S. custody.").

a petition for a writ of habeas corpus in a civilian court to challenge his detention." *Hamdi v. Rumsfeld*, 316 F.3d 450, 471 (4th Cir. 2002). The right to petition for a writ of habeas corpus is, in essence, a right to seek judicial protection against lawless incarceration by executive authorities. If the judiciary could not independently review and reject the Executive's decision to incarcerate a citizen, the writ would never have acquired its longstanding reputation in the law as the "Great Writ." As *Amicus Cato Institute* has more fully explained in *Hamdi v. Rumsfeld* (see 03-6696 Cato Br. 6-13), if the writ of habeas corpus has not been suspended, the writ retains its full legal force – no matter where the seizure of a citizen takes place. Although the Government contests this point, claiming that this "extraordinary context" necessitates a "limited scope of review" (see Brief for the Respondents, *Hamdi v. Rumsfeld* (03-6696) at 10), it would be premature to elaborate upon these issues here, as there are no habeas issues before the Court in this case.

II. THE POWER OF THE EXECUTIVE TO SEIZE AND IMPRISON CITIZENS WITHIN AMERICAN BORDERS

A. SEIZURE

Absent an invasion or rebellion on U.S. territory, the Fourth Amendment establishes the fundamental law regarding the parameters of the Government's power to arrest an individual. The Fourth Amendment of the Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized." U.S. Const. amend. IV.

The arrest of a person is the quintessential "seizure" under the Fourth Amendment. *Payton v. New York*, 445 U.S. 573 (1980). The amendment shields the citizenry from overzealous government agents by placing limits on the powers of the police. The primary "check" is the warrant application process. That process requires the police to apply for arrest warrants, allowing impartial judges to exercise independent judgment regarding whether sufficient evidence has been gathered to meet the "probable cause" standard of the Fourth Amendment. *McDonald v. United States*, 335 U.S. 451 (1948). When government agents seize a citizen without an arrest warrant, the prisoner must be brought before a judicial magistrate within 48 hours so that an impartial judicial officer can examine the government's conduct and discharge anyone illegally seized. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

Although there is no Fourth Amendment issue before the Court in the instant case, it would be useful for this Court to craft its ruling in such a way as to clarify precisely which legal matters have and have not been settled. This is important because the Government has been selectively quoting caselaw from this Court in an attempt to turn dicta into holdings. For example, the Government cites *Ex Parte Quirin*, 317 U.S. 1 (1942), which is a case involving *trial procedures* for enemy combatants, to make sweeping claims about the Executive's power to *seize* citizens on American soil:

> The settled authority of the military to capture and detain fully applies to a combatant who is an American citizen and is seized *within the borders of the United States*. In *Quirin*, *supra*, this Court upheld the President's exercise of military jurisdiction over a group of German combatants who were seized in the United States before carrying out plans to sabotage domestic war facilities during World War II.

Brief for the Petitioner, *Rumsfeld v. Padilla* (No. 03-1027), at 30 (emphasis added). It is misleading for the Government to suggest that this Court has considered and approved an Executive power to conduct arrests on U.S. territory outside of the Fourth Amendment's framework in those instances where a suspect is perceived to be an "enemy combatant." The saboteurs involved in the *Quirin* case were arrested by civilian police officers in Chicago and New York. The prisoners were subsequently transferred to the military for detention, trial, and execution. The *Quirin* holding pertains to trial procedures for prisoners *who do not contest "enemy combatant" allegations*. *See Quirin* at 47. The key point here is that the prisoners in *Quirin* were urging this Court to move their trial to the civilian court system, arguing that the military did not have jurisdiction to try them. *The circumstances of the initial arrests were never before this Court*.[5] It is thus misleading to suggest that *Quirin* authorizes the Executive to seize

[5] Interestingly, the circumstances of the capture of the saboteurs in 1942 seem to have been distorted by government officials at that time. According to one legal historian, the public was led to believe that the FBI caught the German agents through brilliant detective work, but the plot was actually uncovered when one of the German agents "turned himself in and fingered the others." Louis Fisher, *Nazi Saboteurs on Trial*, 46 (2003).

American citizens on American soil outside of the Fourth Amendment framework.[6]

B. IMPRISONMENT

The Constitution places several limitations on the power of the Government to deprive an American citizen of his liberty on American soil. As noted, the Fourth Amendment prohibits unreasonable seizures. The Fifth Amendment guarantees due process. The Sixth Amendment guarantees a speedy and public trial. And the "Great Writ" of habeas corpus guarantees judicial review of an incarceration when no formal criminal charges have been lodged.

In addition to these constitutional provisions, Congress has passed federal laws which pertain to the imprisonment or detention of American citizens on American soil. Since one of these laws, 18 U.S.C. § 4001, is the central issue presently under review, *Amicus Curiae* will focus on that statute.

Before delving into some of the details, however, it would be useful to begin with a constitutional principle that has thus far been obscured in this litigation. The

[6] To be sure, this Court has never suggested that Fourth Amendment principles and procedures apply to the battlefield, but it is equally clear that this Court has never sanctioned "executive arrest warrants" for citizens on U.S. soil. The prospect of government agents arresting American citizens on American soil outside of the Fourth Amendment framework may seem far-fetched, but this Court will likely confront such arguments in the very near future. *See e.g.* Testimony of John Yoo before the U.S. House Permanent Select Committee on Intelligence (October 30, 2003) ("[T]he federal government and the executive branch have broader sources of constitutional authority to protect the national security that do not require a warrant."), *available at* http://intelligence.house.gov/PDF/JohnYootestimony.pdf.

Government's brief is so replete with references to the President's Article II responsibilities as Commander in Chief that its presentation of the matter tends to obscure one of his other constitutional duties, namely, that he "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. That constitutional duty was set down on paper to remind the President (and others) that he should not enter office with a view toward enforcing the laws that tend to aggrandize his power while simultaneously ignoring the laws that tend to constrain his power.

If a law is controversial and is considered unwise, but constitutional, the President must still "take Care" and see that it be "executed." Should the President discover a counterproductive or pernicious law on the books, his duty is to "give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3. If the President is unable to persuade the Congress to repeal a law that the President considers unwise, Article II requires the President to put his own views aside, to humble himself, and to faithfully execute the law of the land.

18 U.S.C. § 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The Government readily admits that this law was designed to prevent a future President from issuing an executive order that would set up prison camps (or "detention centers") for citizens who are perceived to be a threat to national

security.[7] On the Government's view, however, this law means that if such a prison system is contemplated, the President need only be careful when delegating the assignment. On the Government's reading of the law, it is illegal for the Attorney General to set up prison facilities for people who are accused of being "enemy combatants," but it is legal for the Secretary of Defense to administer such facilities:

> Section 4001(a) pertains solely to the detention of American citizens by *civilian* authorities. It has no bearing on the settled authority of the *military* to detain enemy combatants in a time of war.

Brief for the Petitioner at 45 (emphasis in original). That is a fanciful interpretation of Section 4001(a). Had the statutory language covered all of the President's subordinates, someone might also come forward to say that Congress did not specifically prohibit the President from entering into an "executive agreement" with a foreign head of state, whereby American citizens could be transported to, say, Tijuana, Mexico or perhaps to the island of Jamaica, for confinement and interrogation.

18 U.S.C. § 4001 does not create a Maginot Line for the citizenry. It prohibits unilateral executive incarceration in

[7] After the outbreak of war with Japan in 1941, President Roosevelt issued Executive Order 9066, which was designed to protect "against espionage and against sabotage" and authorized military commanders to designate "military areas" in the United States "from which any and all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions" the "Military Commander may impose in discretion." *See generally Korematsu v. United States*, 323 U.S. 214 (1944).

circumstances where the President might be tempted to seize citizens without formal criminal charges. If the President believes that 18 U.S.C. § 4001 is impractical and ought to be repealed or modified, he should make his case to the Congress. The civilian-military distinction that has been advanced by the Government in this litigation is specious.[8]

III. THE SEIZURE AND IMPRISONMENT OF JOSE PADILLA

Jose Padilla flew on his American passport from Pakistan, via Switzerland, to Chicago's O'Hare International Airport. Upon his arrival at the airport, Mr. Padilla was arrested by federal law enforcement agents. These factual circumstances are highly significant to the proper resolution of this case.

First, this Court has often noted that the United States, as sovereign, has a special interest in managing international border crossings. Just this term, the Court noted that the federal government "has inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *United States v. Flores-Montano* (No. 02-1794), slip op. at 8 (March 30, 2004). On international borders, the interplay between the power of government and the constitutional rights of citizens is not the same as

[8] The Government also advances the argument that the Authorization of Force that was passed by the Congress shortly after the September 11th terrorist attacks qualifies as an "Act of Congress" that would permit the imprisonment of American citizens on American soil under the terms of Section 4001. The Court of Appeals properly rejected that argument and *Amicus Curiae* will not burden this Court by repeating those arguments here.

that which takes place within the borders. That point was expressed in *Carroll v. United States*, 267 U.S. 132 (1925):

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country . . . have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

Id. at 153-54. Thus, under the border search doctrine, neither probable cause nor a search warrant is required to search a person, even an American citizen, at the border.

Second, this Court has also noted that international airports are the functional equivalent of the border. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973). Although Chicago's O'Hare airport is not located on an international border geographically, that airport has been held to be the "functional equivalent of an international border." *See United States v. Teng Yang*, 286 F.3d 940, 944 (7th Cir. 2002).

Given the factual circumstances of Mr. Padilla's arrest and this Court's jurisprudence with regard to the Government's special interest at the border, *Amicus Curiae* submits that statements concerning the seizure of "American citizens

on American soil" (*Padilla v. Rumsfeld*, 352 F.3d 695, 722 (2d Cir. 2003)) are inapposite for this particular case.[9] *Shaughnessy v. Mezei*, 345 U.S. 206 (1953) is also instructive on this point. Ignatz Mezei immigrated to America in 1923 and resided here as a lawful alien for twenty-five years. In 1948, he traveled to Hungary and remained there for 19 months. When Mezei attempted to return to the United States, the Attorney General ordered his exclusion citing national security. Mezei was confined on Ellis Island, in the harbor of New York City, for months because no other country would accept him. After 21 months had passed, Mezei petitioned for a writ of habeas corpus, arguing that his continued confinement on Ellis Island amounted to an indefinite, unlawful detention.

In rejecting Mezei's constitutional claim, this Court emphasized that his presence on Ellis Island did not constitute an "entry" into the United States. For purposes of constitutional analysis, Mezei was treated "as if he stopped at the border." *Id.* at 215.[10] If the logic of the *Mezei*

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[9] Both Petitioner and Respondent proceed from the premise that Mr. Padilla entered the United States – and therefore claim that this case is about an American who has been arrested "on American soil." See Brief for the Petitioner, at 38 ("The Commander in Chief . . . has authority to seize and detain enemy combatants wherever found, including *within the borders of the United States*.") (Emphasis added); Brief in Opposition of Respondent, at 16 (The Commander-in-Chief Clause does not give the President authority to seize "American citizens *on American soil* outside a zone of combat.") Both Petitioner and Respondent are mistaken on this crucial point.

[10] *Amicus Curiae* respectfully submits that this Court erred in holding that Mr. Mezei could be confined indefinitely *with no hearing whatsoever*. *See Shaughnessy v. Mezei*, 345 U.S. 206 (1953) (Black, J., dissenting). Since the Attorney General refused to present evidence to

(Continued on following page)

ruling is applied to Mr. Padilla, it is clear that as a matter of law his arrival at an American airport did not constitute an entry into the United States. In that legal posture, it is difficult to see how Mr. Padilla's legal rights at an O'Hare terminal can be any different than the rights he might have had had he been arrested by Pakistani and American authorities when he was boarding the airplane in Pakistan.

Although the Government is profoundly mistaken about the applicability of 18 U.S.C. § 4001 to American citizens within America's borders, *Amicus Curiae* submits that the statute does not apply to citizens who are seized on the border or abroad. "It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Smith v. United States*, 507 U.S. 197, 204 (1993) (citations and internal quotation marks omitted). Both the language and legislative purpose of 18 U.S.C. § 4001 support the applicability of that presumption. The explicit purpose of Section 4001 was to repeal the Emergency Detention Act of 1950, former 50 U.S.C. §§ 811-826 (1970). Under the Emergency Detention Act, if the President declared an "*Internal* Security Emergency," the Attorney General was authorized to detain persons who were perceived to be dangerous. As previously noted, Congress was also determined to legally forestall any attempt to revive the concentration camps that were set up during World War II for Japanese-American citizens. But there is no clear evidence in the language or legislative history of Section 4001 to support the idea that it applies to American

an impartial judge, the writ of habeas corpus ought to have been issued and the prisoner should have been discharged.

citizens who have been seized beyond America's borders.[11] Thus, the Court of Appeals for the Second Circuit erred in its ruling that Mr. Padilla must be released or charged with a formal criminal offense by civilian authorities. Mr. Padilla is situated differently than the typical American citizen who resides in the City of Chicago.

Judge Wesley has correctly identified the "real weakness" in the Government's appeal, namely, its adamant refusal to acknowledge Mr. Padilla's right to have his day in court to rebut the "enemy combatant" allegations. *Padilla v. Rumsfeld*, 352 F.3d 695, 732-33 (2d Cir. 2003) (Wesley, J., concurring in part, dissenting in part). Every Article III judge in this litigation has properly rejected the Government's contention that Mr. Padilla can be denied access to counsel and that the habeas petition that has been filed on his behalf ought to be summarily dismissed. But the court below erred insofar as it concluded that the President did not have the inherent power to detain Mr. Padilla in the circumstances of this case. Thus, a proper disposition of this case would be to vacate the judgment of the court of appeals and to remand for further proceedings.

On remand, Mr. Padilla should be able to meet with his attorney in a private setting. An evidentiary hearing should then be held and the prisoner should have an

[11] Consider the so-called "American Taliban," John Walker Lindh, who was taken into custody in Afghanistan. *See generally United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002). The Government had the option of holding Mr. Lindh as a prisoner of war, or going further, and prosecuting him for criminal violations. It is far-fetched to say that Section 4001 would have applied to Mr. Lindh in the event the Government had chosen to hold him as a POW.

opportunity to address the Court, and his counsel must have an opportunity to rebut the Government's "enemy combatant" allegations at the hearing. If the Government can persuade an Article III judge that the "enemy combatant" allegation is true, Mr. Padilla can be remanded to the military brig.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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No. 03-1027

IN THE SUPREME COURT OF THE UNITED STATES

DONALD RUMSFELD,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

Amici Curiae are law professors who are concerned about the human rights questions involved in this matter. *Amici* support affirmance and write to situate the issues in this case within the broader context of international human rights law. *Amici* believe that this Court's analysis of the decision rendered by the Second Circuit should take into account the serious rights questions raised by the assertion of executive authority to designate, detain, and isolate people deemed "enemy combatants" or any equivalent category. These concerns weigh strongly against endorsement of such broad, unilateral executive power and in favor of a strict construction of the Joint Resolution.*

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* Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part. The brief was written by Daniel Kanstroom, counsel for *Amici Curiae*, with the assistance of Sara Leary, Hanh Nguyen, Tatum Pritchard, and Haimavathi Varadan, students at Boston College Law School. No one other than *Amici Curiae*, Boston College Law School, or counsel for *Amici Curiae* has made a monetary contribution to the preparation or submission of the brief. Both Petitioner and Respondent have consented to the filing of this brief. Letters of consent have been lodged with the clerk.

SUMMARY OF ARGUMENT

No challenges to human rights are more basic than those presented by the seizure, isolation, interrogation without counsel, and detention of a United States citizen in the United States by the executive branch of government. This Court's answers to those challenges should comply with and be informed by the standards of international human rights law.

Amici believe that this case is governed by principles of domestic constitutional and criminal law which relate to international human rights law in historical and evolving ways. The rules provided by this body of law could not be clearer: Mr. Padilla may not be designated by executive order as an "enemy combatant" and thereby held outside all of the accepted norms of human rights law.

The government's first major contention is that "the President's inherent powers as Commander in Chief are substantially more robust than recognized by the court of appeals." (Petitioner's Brief [hereinafter Pet. Br.] at 14) This proposition cannot mean that Mr. Padilla may be unilaterally designated as an "enemy combatant" and then deprived of all rights, including the basic rights to counsel and to meaningful judicial review of the legality of his detention. Such a ruling by this Court would contradict the most fundamental norms of human rights developed over hundreds of years and represented by documents as central to our legal system as *Magna Carta*, the Suspension Clause[1] and the Fifth Amendment.[2] Moreover, it would violate basic principles of international human rights law to which the United States is bound and which should inform this Court's analysis of the scope of *habeas corpus* review in this case.

Indeed, even if this Court were to accept the government's second major argument—that Congress has authorized the detention of Mr. Padilla through the Authorization for Use of Military Force Joint Resolution[3] [hereinafter "Joint Resolution"]—the required result would be no different. Congressional authorization of unreviewable executive detention of a U.S. citizen on U.S. soil, or indeed of any person, cannot overcome the requirements of the U.S. Constitution and of international human rights law. As James Madison once noted as to non-citizens, "[even if they] are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them..."[4]

The Court's interpretation of the Joint Resolution and the Non-Detention Act[5] should be informed by basic human rights principles. Absent the clearest possible statement by Congress, this Court should strive to avoid both a serious constitutional question and a serious conflict with well-accepted human rights norms.

Most importantly, *Amici* urge this Court to make clear that:

- Mr. Padilla has a fundamental human right against arbitrary detention;
- this right derives from his humanity, not only from his U.S. citizenship;
- this right includes a right to counsel and to meaningful *habeas corpus* judicial review.

[1] U.S. CONST. art. I, § 9.
[2] U.S. CONST. amend.V.

[3] Pub. L. No. 107-40, 115 Stat. 224 (2001).
[4] James Madison, *Report on the Virginia Resolutions*, 4 Debates, Resolutions and Other Proceedings, in Convention on the Adoption of the Federal Constitution 556 (Jonathan Elliot ed., 2d ed. 1836).
[5] Non-Detention Act, 18 U.S.C. § 4001(a) (2000).

ARGUMENT

I. INTERNATIONAL HUMAN RIGHTS LAW PROHIBITS ARBITRARY DETENTION OF ANY PERSON AND MANDATES MEANINGFUL JUDICIAL REVIEW OF DETENTION

A. International Human Rights Law Prohibits Arbitrary Detention

The protections of international human rights law against arbitrary government detention are as fundamental as any legal principles one can imagine. Their lineage in our legal system may be traced at least as far as back as 1215 to the ringing guarantees of *Magna Carta* that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." As Alexander Hamilton once noted, "The practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instrument of tyranny."[6]

Regardless of the formal legal status or the location of a person, contemporary international human rights law, heir to this long tradition, clearly prohibits "arbitrary detention." It is a central part of the International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified.[7] Widespread acceptance of the prohibition

[6] *See* THE FEDERALIST No. 84, at 533 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

[7] The General Assembly of the United Nations adopted the Covenant in 1966, and it entered into force in 1976. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, art. 9, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [hereinafter ICCPR]. As of November 2003 there were 151 parties to the Covenant. The United States ratified the ICCPR in 1992 with certain "reservations, understandings, and declarations." The first declaration asserts that articles 1 to 27 of the ICCPR will not be self-executing in the U.S. U.S. Senate Resolution of Advice and Consent

of arbitrary detention evidenced by multilateral instruments, declarations, and intergovernmental bodies shows that this prohibition is customary international law and indeed may be a *jus cogens* norm.[8] The Restatement (Third) of Foreign Relations Law of the United States lists prolonged arbitrary detention among the human rights violations that rise to the level of *jus cogens*.[9] As the Tenth Circuit Court of Appeals has noted, "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."[10]

This principle is not contradicted by the international law of armed conflict (also known as "international humanitarian law" or the "law of war".) *Amici* conclude that the government is mistaken in its reliance upon this body of

to Ratification of the International Covenant on Civil and Political Rights, 102d Cong., 2d Sess., 138 Cong. Rec. S4783 (daily ed. Apr. 2, 1992). S. Exec. Rep., No. 102-23, at 15 (1992). *See infra* Sec. II. B.

[8] Other relevant instruments include: Universal Declaration of Human Rights, G.A. Res. 217A(III), 3d. Sess., art. 9, U.N. Doc. A/810 (1948) [hereinafter UDHR]; American Convention on Human Rights, Nov. 22, 1969, art. 7, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention] (signed by the U.S. on June, 1, 1997); American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, art. XXV, OEA/Ser.L.V/II82 doc.6 rev.1, at 17 (1948) [hereinafter American Declaration]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5, 213 U.N.T.S. 221. [hereinafter European Convention]; African [Banjul] Charter on Human and People's Rights, June 27, 1981, art. 6, O.A.U. Doc. CAB/LEG/67/3 Rev.5 21 I.L.M. 58 [hereinafter Banjul Charter]; Arab Charter on Human Rights, Sept. 15, 1994, art. 8, *reprinted in* 18 HUM. RTS. L.J. 151 (1997) [hereinafter Arab Charter]. *See also* Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N.GAOR, Supp. No. 49, at 298, princs. 2, 4, U.N. Doc. A/43/49 (1988).

[9] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) [hereinafter "RESTATEMENT"].

[10] *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981); *see also Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) ("There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention.") (citations omitted).

law to justify its detention of Mr. Padilla, who is not a "combatant" in an "armed conflict."[11] To be sure, a civilian who takes *direct* part in hostilities may be treated as a combatant.[12] But this rule cannot be extended to a person accused of planning an attack, as is the case with Mr. Padilla. Such an extension would largely obliterate the dividing line between civilians and combatants and would implicitly render civilians legitimate targets of military attack. It would also render irrelevant the Constitution's provisions applicable to criminal proceedings, in which courts are given the central role of preserving individual liberties against legislative and executive overreaching.[13] This Court should not acquiesce in so radical an extension of the law of war.

Rather, this Court should apply the well-accepted principles of international human rights law that exist within our constitutional framework to Mr. Padilla. Such an application of principles comports with the Universal Declaration of Human Rights (UDHR), which is recognized as both the prototype for and the embodiment of many international human rights norms. The UDHR states simply and directly that, "[n]o one shall be subjected to arbitrary

[11] *See* Protocol Additional [I] to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Additional Protocol I]; Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *see also Ex parte Quirin*, 317 U.S. 1, 21-22 (designating as "enemy combatants" *members of the armed forces* of Germany who shed their uniforms and entered the U.S. as saboteurs); *cf. Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943) (upholding prosecution in criminal courts of those who aided such plots).

[12] Additional Protocol I, *supra* note 11, art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.")

[13] *See, e.g.*, U.S. CONST. art. III, § 3 (judiciary to try criminal cases involving treason), amend. IV (courts oversee issuance of search warrants), amend. V (grand juries issue criminal indictments), amend. VI (criminal defendants entitled to "a speedy and public trial").

arrest, detention or exile."[14] More specifically, Article 9 of the ICCPR sets out the specific prohibition against arbitrary detention. Article 9(1) provides that:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such ground and in accordance with such procedure as are established by law.

Deprivation of liberty may only be carried out "in the cases and according to the procedures established in pre-existing law."[15] Therefore, at a bare minimum, arrest and detention must be initiated upon legitimate legal grounds and State authorities must follow accepted legal procedure.[16]

Of course, mere compliance with national law does not inevitably render detention permissible because the law and its enforcement also must not be arbitrary.[17] Thus, in addition to being formally authorized by law, detention must

[14] UDHR, *supra* note 8, art. 9 (1948); *see* HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAWS, POLITICS, MORALS 138-39 (2d ed. 2000); David A. Martin, *How Rhetoric Became Rights*, WASH. POST, Nov. 1, 1998. The U.S. voted for the UDHR's adoption and reaffirmed its commitment on its 50th anniversary in 1998.

[15] *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 171 (1993).

[16] *See id.*; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L. J. 503, 507 (2003).

[17] *See* NOWAK, *supra* note 15, at 172 (1993); *see also Wintwerp v. Netherlands*, 33 Eur. Ct. H.R. (Ser. A), para. 39 (1979) ("[i]n any democratic society subscribing to the rule of law ... no detention that is arbitrary can ever be regarded as lawful"). Indeed, the *travaux preparatoires* (drafting history) of the UDHR indicate that the term "arbitrary" covers detentions that are unauthorized by law, as well as detentions undertaken pursuant to unjust laws. *See* 3 U.N. GAOR, Pt. I, Third Comm. 247, 248 (1948). *See generally* Parvez Hassan, *The Word "Arbitrary" As Used in the Universal Declaration of Human Rights*, 10 HARV. INT'L L. J. 225 (1969).

not be unjust, unreasonable, or infringe upon human dignity.[18]

B. International Human Rights Law Requires Meaningful Judicial Review of Detention

To ensure that detention is not arbitrary, international human rights law guarantees a concomitant right to meaningful judicial review. Any individual deprived of liberty by arrest or detention has the rights to appear before a court without delay, to ask the court to determine the legality of detention, and to be released if the detention is unlawful.[19] These guarantees are informed by the related rights to an effective remedy for rights violations and to "a fair and public hearing by an independent and impartial tribunal."[20]

For judicial review to protect against arbitrary detention, it clearly must be both available and meaningful. At the very least this means that the judiciary may not simply decline to hear the case as a matter of law.[21] As the Inter-American Court of Human Rights has noted in its construction of the American Convention,[22] the proper test is whether judicial review is "truly effective in establishing whether there has been a violation of human rights and in providing redress."[23]

The right to speedy review is an accepted requirement,[24] as is the right to counsel.[25] In *Öcalan v. Turkey* the European Court of Human Rights noted that counsel may be required to facilitate effective review.[26] The Restatement also makes clear that detention is arbitrary when "the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time."[27]

C. International Human Rights Law Does Not Support Analysis of This Case as a Derogation of the Right to Meaningful Judicial Review

[18] *See* NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 376 (2002) (*citing* U.N. Docs. A/2929, ch. VI, secs. 29, 30, 31; A/4045, sec. 49) ("The discussions during the drafting of ICCPR 9 suggest that the word 'arbitrary' was understood to mean 'unjust', or incompatible with the principles of justice or with the dignity of the human person."); *see also Study of the Right of Everyone to Be Free From Arbitrary Arrest, Detention and Exile*, U.N. Doc. E/CN.4/826/Rev./1, at 7 (1964) ("An arrest is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person.").

[19] *See, e.g.*, ICCPR, *supra* note 7, art. 9(4); American Declaration, *supra* note 8, art. XXV.

[20] ICCPR, *supra* note 7, arts. 2(3), 14(1); American Declaration, *supra* note 8, art. XXVIII; UDHR, *supra* note 8, art. 10.

[21] *See* the *Castillo Petruzzi Case* in which a local law denied suspected terrorists writs of *habeas corpus*. *Castillo Petruzzi Case, Merits, Judgment*, Inter-Am. Ct. H.R. (Ser. C) No. 52, para. 184-88 (May 30, 1999) (finding that the absence of an effective remedy is a violation of Article 7 of the American Convention and of "the very rule of law in a democratic society").

[22] *Amici* do not suggest that this Court is bound by opinions of the Inter-American Court of Human Rights. We do, however, believe that this Court should consider such opinions as well-respected, expert understandings of international human rights law.

[23] *Castillo Petruzzi Case, Merits, Judgment*, Inter-Am. Ct. H.R. (Ser. C) No. 52, para. 185 (May 30, 1999). The U.N. Human Rights Commission found judicial review ineffective in *Vuolanne v. Finland*, Views of the H.R. Comm. under Article 5, ¶4, of the Optional Protocol to the ICCPR, 35th Sess., Communication No. 265/1987, U.N. Doc. CCPR/C/35/D/265/1987 (1989) (review by a supervisory military officer did not offer a meaningful recourse as it did not have judicial character).

[24] *G.B. v. Switzerland*, App. No. 27426/95, Eur. Ct. H. R., para. 38 (2000) (finding that the Swiss court's two-tiered procedure prevented the detainee from a "speedy" result).

[25] *See e.g., Report on Terrorism and Human Rights*, OEA/Ser.L./V/II.116 doc. 5 rev. 1 corr., paras. 19, 121, 127 (2002).

[26] *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H. R., para. 69 (2003).

[27] RESTATEMENT, *supra* note 9, § 702 cmt. h.

Extenuating circumstances may permit States to derogate temporarily from some international human rights obligations in accordance with certain safeguards.[28] Article 4 of the ICCPR states the permissible conditions for derogation:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties ... may take measures derogating from their obligations ... to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law ...[29]

Amici do not in any way underestimate the gravity of the September 11th attacks or the threat they presented to the United States. However, the continuing, amorphous threat of terrorist activity without a foreseeable end cannot justify an indefinite derogation under Article 4.[30] Mr. Padilla's case should not be analyzed under this rubric.

ICCPR Article 4 and similar derogation provisions require an official proclamation of a state of emergency which "threatens the life of the nation."[31] Moreover, the

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[28] U.N.H.R. Comm., General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, para. 1 (2001) [hereinafter General Comment No. 29].

[29] ICCPR, *supra* note 7, art. 4(1). For similar derogation provisions see European Convention, *supra* note 8, art. 15(1); American Convention, *supra* note 8, art. 27(1).

[30] *See* Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 DENV. J. INT'L L & POL'Y 58, 67 (2002).

[31] *See* ICCPR, *supra* note 7, art. 4(1); European Convention, *supra* note 8, art. 15(1); American Convention, *supra* note 8, art. 27(1). The United States has not submitted any such official statement to the U.N. or other State parties to the ICCPR. The official proclamation must specifically describe the nature of and justification for the derogation, among other things. *See Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. ESCOR, Annex, U.N. Doc E/CN.4/1985/4, para. 39(a)-(b) (1985) [hereinafter *Siracusa Principles*]. The Siracusa Principles were

requisite threat should affect the entire population and at least part of the territory of the State, challenging its physical integrity, the political independence of the State, or the basic function of institutions necessary to protect the human rights recognized in the ICCPR.[32] A derogation is strictly limited to what is necessary under the circumstances in terms of proportionality, material scope, duration, and geographical coverage.[33] The strict necessity of each individual measure should be examined objectively, not allowing derogation if ordinary measures are sufficient or "merely because of an apprehension of potential danger."[34]

Certain rights, such as those against torture and slavery, are explicitly exempt from derogation in any situation.[35] The fact that the right against arbitrary detention is not explicitly listed as non-derogable, however, does not mean that it is unprotected in states of emergency.[36] Indeed, the United Nations Human Rights Committee[37] has included the prohibition of arbitrary deprivation of liberty in a list of

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promulgated in 1984 by a conference of experts and adopted by the U.N. to serve as a tool for interpreting the language of the ICCPR and clarifying the confines of acceptable derogation. *See* Raquel Aldana-Pindell, *Derogation is Not the Norm!: Regulating the September 11th Detentions* (unpublished manuscript, on file with author).

[32] *Siracusa Principles*, *supra* note 31, para. 39.

[33] *See* General Comment No. 29, *supra* note 28, para. 4.

[34] *Siracusa Principles*, *supra* note 31, paras. 51-54.

[35] Under ICCPR Article 4 these are: the right to life; the prohibition of torture or cruel, inhuman or degrading punishment; the prohibition of slavery, slave-trade and servitude; the prohibition of imprisonment because of inability to fulfill a contractual obligation; the principle of legality in the field of criminal law; the recognition of everyone as a person before the law, and freedom of thought, conscience and religion. *See* ICCPR, *supra* note 7, art. 4(2).

[36] General Comment No. 29, *supra* note 28, para. 6.

[37] The commentary and decisions of the Human Rights Committee have been recognized as an important aid to interpretation of the ICCPR. *See e.g.*, *Maria v. McElroy*, 68 F. Supp.2d 206, 232 (E.D.N.Y. 1999); *United States v. Bakeas*, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997); Report of the Committee, 1994 Report, vol. 1, 49 U.N. GAOR, Supp. No. 40, U.N. Doc. A/49/40, para. 5 ("General comments...are intended... [among other purposes] to clarify the requirements of the Covenant....").

humanitarian law and peremptory norms of international law from which States parties may not derogate under Article 4.[38] Thus, even in a state of emergency, rights to a fair trial and to an effective remedy for violations of rights do not disappear.[39] In order to protect non-derogable rights, the right to have a court decide without delay on the lawfulness of the detention must not be diminished by a decision to derogate.[40] Detention for an indefinite period of time is generally prohibited, as is being held incommunicado from family, friends, or lawyer for more than a few days.[41] Periodic evaluation by an independent review tribunal of the detention of persons detained without charge is required, as is the right to a fair trial by a competent, independent, and impartial court for those who are charged.[42]

A State party to the ICCPR simply may not derogate from the required entitlement to effective judicial review of detention.[43] The Inter-American Court of Human Rights has ruled that while liberty rights may be derogable, the right to judicial remedies, including *habeas corpus* and other forms of judicial review available to detainees, are not because they are essential for the protection of all other non-derogable rights.[44] As the European Court of Human Rights has stated, "[n]ational authorities cannot do away with effective control

[38] General Comment No. 29, *supra* note 28, para. 11 ("State parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or preemptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.")

[39] *See* General Comment No. 29, *supra* note 28.

[40] General Comment No. 29, *supra* note 28, para. 16.

[41] *Siracusa Principles*, *supra* note 31, para. 70(b)-(c).

[42] *Siracusa principles*, *supra* note 31, para. 70(e)-(d).

[43] Concluding Observation of the Human Rights Commission: Israel, 63rd Sess., U.N. Doc. CCPR/C/79/Add.93, para. 21 (1998).

[44] *Judicial Guarantees in States of Emergency,* Advisory Opinion No. OC-9/87, Inter-Am, C.H.R. (Ser. A) No.9, paras. 24, 41 (Oct. 6, 1987); *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) No. 8, paras. 42, 44 (January 30, 1987).

of lawfulness of detention by the domestic courts whenever they chose to assert that national security and terrorism are involved."[45]

In sum, there can be no doubt that the unilateral designation of Mr. Padilla as an "enemy combatant" by the executive branch, his subsequent indefinite detention, and his isolation implicate the most fundamental protections of international human rights law.[46]

II. INTERNATIONAL HUMAN RIGHTS LAW IS PART OF UNITED STATES LAW AND IT SHOULD INFORM THIS COURT'S ANALYSIS

[45] *Al-Nashif v. Bulgaria,* App. No. 50963/94, Eur. Ct. H.R. (2002) (Mr. Al-Nashif, a local Muslim religious teacher, was detained after Bulgaria withdrew his residence permit and issued a deportation order because he allegedly posed a threat to national security. During his detention, he was denied contact with others, including counsel, rendering him unable to challenge the allegations against him. The Court found the procedure incompatible with protections against arbitrary arrest and detention). *See also Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1997) ("Although the Court is of the view ... that the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention. This period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture ... Moreover, the Government have not adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable.").

[46] *See Civil and Political Rights, Including the Question of Torture and Detention*, Report of the Working Group on Arbitrary Detention; Category I (persons detained on United States territory). Opinion No. 21/2002 (E/CN.4/2003/8/Add.1): "The Working Group considers that Mr. X and Mr. Y have been detained for more than 14 months, apparently in solitary confinement, without having been officially informed of any charge, without being able to communicate with their families and without a court being asked to rule on the lawfulness of their detention. This situation is such as to confer an arbitrary character on their detention, with regard to articles 9 and 14 of the [ICCPR]..." *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/TestFrame/c58095e9f8267e6cc1256cc60034de72?Open document.

A. International Law Is Part of the Law of the United States

There is no question that international law, pursuant both to treaties and customary law, is now—and always has been—part of United States law.[47] As to treaties, the rule is clear: international treaties are "the supreme law of the land"[48] and judicial power of the United States "shall extend to all…treaties made" under the authority of the United States.[49]

Our domestic legal system has also long incorporated customary international law.[50] In the late eighteenth century, the law of nations was seen as part of natural law and, as such, obligatory.[51] Thus, as this Court noted in 1796, "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."[52] The nineteenth century ascendance of positivist jurisprudence in international law did not change the basic principle that customary international law is part of U.S. law. Justice Gray's famous statement discussing the applicability of customary international law to the seizure of fishing boats in Cuban waters by the U.S. navy arose from this jurisprudential milieu: "International law, is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as the question of right depending upon it are duly presented for their determination."[53]

The Restatement notes that, "international law and international agreements are the law of the United States."[54] Cases arising under international law or international agreements to which the United States has acquiesced are within the jurisdiction of U.S. courts and these courts "are bound to give effect to international law."[55] Similarly, "cases arising under customary international law" are "within the Judicial Power of the United States under Article III, section 2 of the Constitution."[56] As noted above, *Amici* conclude that

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[47] Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-62 (1984). *See also*, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2385-86 (1991) ("[A]s federal courts have done over the centuries, [judges] determine whether a clear international consensus has crystallized around a legal norm that protects or bestows rights…").

[48] U.S. CONST. art. VI, cl. 2. ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every state shall be bound thereby…").

[49] U.S. CONST. art. III, §2, cl. 1. *See also United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801) (where a treaty is the law of the land and affects the rights of litigating parties, the treaty binds those rights and should be regarded by courts as an act of Congress).

[50] *See generally*, Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 464 (1997) ("As new members in the community of nations, the Founders felt bound, both ethically and pragmatically, to inherit and abide by the law of nations").

[51] *See generally*, Harold H. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280, 282-5(1932) (noting that both Blackstone and Lord Mansfield held that the law of nations was incorporated into the common law of England); *see also*, Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 238, 253 (1932).

[52] *See Ware v. Hylton*, 3 U.S. 199, 281 (1796); *Talbot v. Janson*, 3 U.S. 133, 161 (1795) (stating "this is so palpable a violation of our own law ... of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since"); *Chisholm v. Georgia*, 2 U.S. 419, 474 (1793) (holding "the United States had . . . become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed"); 1 Opp. Att'y Gen. 26, 27 (1792) (concluding "the law of nations, although not specifically adopted . . . is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation."); Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT'L L. 301 (1999) (collecting authorities).

[53] *See The Paquete Habana*, 175 U.S. 677, 700 (1900).

[54] RESTATEMENT, *supra* note 9, § 111(1).

[55] *See id.* at § 111(2), (3). Moreover, the President of the United States has the obligation and authority to make sure that international law is faithfully executed within the boundaries of this nation. *See id.* at § 111 cmt. e.

[56] *See* RESTATEMENT, *supra* note 9, § 111 cmt. e. Moreover, as this Court recognized in *Ex parte Quirin*, the "law of war" is part of the law of

the detention and isolation of Mr. Padilla violate the requirements of the ICCPR and customary international law. The question, then, is whether that treaty and customary international human rights law are U.S. law. *Amici* believe that they are.

B. The Senate Declaration That the ICCPR Is Not Self-Executing Does Not Render It Meaningless To Mr. Padilla

The Senate subjected its advice and consent to a declaration that the ICCPR is not "self-executing."[57] This, however, does not render it irrelevant to Mr. Padilla. First, the ICCPR is unquestionably binding on the United States as a ratified treaty.[58] Although it may not provide a direct "rule for the Court," ratification of the ICCPR clearly obliges the President and Congress faithfully to implement it.[59] Moreover, this Court should endeavor to construe any ambiguity in the non-self-executing doctrine in favor of applicability. This Court should not turn a blind eye to the fact that the executive has proceeded against Mr. Padilla in a manner that is contradictory to both the letter and the spirit

nations and, as such, prescribes the rights and duties of nations in dealing with "enemy individuals." *See* 317 U.S. at 27-28.

[57] 138 Cong. Rec. S4781-01 (1992).

[58] *See e.g., United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000) (recognizing ICCPR as "supreme law of the land" notwithstanding no-self-executing declaration). *See also*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 198-203 (2d ed. 1996) (describing such declarations as "'anti-Constitutional' in spirit and highly problematic as a matter of law") [hereinafter HENKIN, FOREIGN AFFAIRS].

[59] *See* RESTATEMENT, *supra* note 9, § 111, rep. n.5 (noting "if a treaty is not self executing for a state party, that state is obligated to implement it promptly, and failure to do so would render it in default under its treaty obligations"); *see also* RESTATEMENT, *supra* note 9, § 115(1)(b) (stating "a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation").

of the ICCPR. Given the ambiguity of Presidential authority in this matter, as evidenced by the decision of the Second Circuit below, this Court should not easily acquiesce in executive action that so clearly disregards international law.[60] The underlying principle is one of separation of powers informed by human rights norms.

The provisions of non-self-executing treaties may have domestic effect,[61] particularly where, as here, they also embody binding principles of customary international law.[62] In light of the widespread acceptance of the principle against arbitrary detention, such a construction is particularly applicable to Article 9 of the ICCPR.[63]

[60] *See* HENKIN, FOREIGN AFFAIRS, *supra* note 58, at 244-45 (noting "there was no suggestion [in *Garcia-Mir*] that the president ordered the detention in the valid exercise of some independent constitutional authority as 'sole organ' or as Commander in Chief that might have effect as law of the United States...").

[61] *See e.g., Duarte-Acero*, 132 F. Supp.2d at 1040 n.8 (S.D. Fla. 2001) (declaration does not apply to defensive claims); *Bakeas*, 987 F. Supp. at 46 n.4 (D. Mass. 1997) (noting that policies of the Federal Bureau of Prisons may violate the ICCPR).

[62] *See e.g., Filartiga v. Pena*, 630 F.2d 876, 882 n.9 (2d Cir. 1980) (noting that although a treaty may be non-self-executing, "this observation alone does not end our inquiry"); *United States v. Toscanino*, 500 F.2d 267, 276-77 (2d Cir. 1974) (considering the applicability of the non-self-executing United Nations Charter and the Organization of American States charter "as evidence of binding principles of international law"). *But see Beazley v. Johnson*, 242 F.3d 248, 263-68 (5th Cir. 2001) (finding that ICCPR provisions barring imposition of the death penalty for crimes committed before the age of eighteen did not apply since the ICCPR was non-self-executing); *Igartua de la Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 2000) (*per curiam*) (rejecting a voting rights claim that was based in part on ICCPR).

[63] As the U.N. Human Rights Committee has noted, provisions in the Covenant that represent peremptory norms of customary international law may not be the subject of reservations. U.N.H.R. Comm., General Comment 24 (52), General Comment on Issues Relating To Reservations Made Upon Ratification Or Accession To The Covenant Or The Optional Protocols Thereto, Or In Relation To Declarations Under Article 41 Of The Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6, paras. 11-12 (Nov. 2, 1994). [hereinafter General Comment 24] *See also Rodriguez-Fernandez v. Wilkinson*, 505 F.Supp. 787, 795 *aff'd on other grounds*,

C. Customary International Law Should Also Inform This Court's Analysis

Even if this Court were to conclude that the ICCPR does not directly govern this case, the inquiry into international law does not end there. Few legal principles are more well-entrenched than the venerable proposition that United States law should be construed in a manner that does not conflict with international law.[64] More broadly, this Court has recently recognized the importance of respecting the "values we share with a wider civilization."[65] Thus, in deciding the present case, customary international human rights law is applicable and the Court should strive to construe domestic laws in a manner consistent with its principles.[66]

It is true that a valid presidential act may supersede the applicability of a particular rule of customary international law.[67] The *"Charming Betsy"* rule, however, counsels in favor of a "clear statement" interpretive approach: laws and executive actions are to be read in conformity with international law where possible. In order to overrule customary international law, domestic legal action must post-date the development of a customary international law norm, and must clearly repeal that norm.[68] Where government action appears to contradict international law—as does the executive's interpretation of its inherent authority and that authorized by the Joint Resolution—the judiciary should construe the action so as to resolve the contradiction, if possible.[69] Moreover, where, as here, the rule against

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654 F.2d 1382 (10th Cir. 1981) ("... review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law."); Louis Henkin, *Evolving Concepts of International Human Rights and the Current Consensus*, 170 F.R.D. 275, 281-84 (1997) (paper presented at the International Human Rights Session, Judicial Conference-Second Circuit, June 15, 1996 concluding that non-formally-binding treaties may be an important tool in statutory construction).

[64] *See Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *Talbot v. Seeman*, 5 U.S. 1, 43 (1801) (stating "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law"); RESTATEMENT, *supra* note 9, § 114 (noting that U.S. statutes should be construed to avoid conflict with international law); *see also Weinberger v. Rossi*, 456 U.S. 25 (1982) (interpreting a statute prohibiting discrimination against United States citizens on military bases overseas); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), (interpreting the National Labor Relations Act in the maritime context so as not to run afoul of a "well-established rule of international law"); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (applying the *Charming Betsy* rule and international law in a maritime tort case to interpret the Jones Act).

[65] *See Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (citing decisions of the European Court of Human Rights); *see also Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (discussing the consensus of "the world community").

[66] *See e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (noting courts must reevaluate past precedents where the "intervening development of the law" has "weakened the conceptual underpinnings from the prior decision").

[67] *See The Paquete Habana*, 175 U.S. at 694; RESTATEMENT, *supra* note 9, § 111 cmt. c; RESTATEMENT, *supra* note 9, § 115 rep. n.5; Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 920 (1986).

[68] *See e.g., Maria v. McElroy*, 68 F. Supp. 2d at 231 ("Congress can be assumed, in the absence of a statement to the contrary, to be legislating in conformity with international law and to be cognizant of this country's global leadership position and the need for it to set an example with respect to human rights obligations"). *Cf. Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (stating where Congress has made its intent in the statute clear, we must give effect to that intent); *I.N.S. v. St. Cyr*, 533 U.S. 289, 315-201 (2001) (holding Congress may enact *ex post facto* law removing an alien's right only with a clear statement).

[69] *See generally* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1143, n.177 (1990) (listing cases in which courts have construed smuggling and drug statutes to bring them into conformity with international jurisdictional and admiralty law); *Beharry v. Reno*, 183 F. Supp. 2d 584, 598-600 (E.D.N.Y. 2002) *overruled on other grounds*. The failure of Congress to enunciate international human rights

arbitrary detention is so deeply entrenched and so fundamental to all other basic human rights, this Court should not simply ratify any presidential act as a valid "over-ride."[70] The ambiguity as to the President's inherent authority to designate and detain Mr. Padilla should be read in light of the powerful requirements of human rights law. *Amici* agree with the Second Circuit Court of Appeals that the President does not have such unilateral inherent authority as a matter of U.S. law. However, even if this Court were inclined agree with the government's position that the Joint Resolution constitutes legislative authorization, so imprecise a legislative act likewise should not be read to over-ride the powerful requirements of human rights law.[71]

The Declaration of Independence noted that the American people must pay "decent respect to the opinions of mankind."[72] This Court has taken this principle seriously and should continue to do so. As Justice Blackmun has noted, this venerable idea requires that evolving standards of decency be measured against international norms.[73] The framers recognized that the United States would be part of a world community, "answerable to foreign powers for the conduct of its members."[74] As Chief Justice John Jay stated in 1793,[75] "the United States had, by taking a place among

principles in the Joint Resolution itself does not in any way prevent this Court from construing ambiguity to conform to international law. Steinhardt, *supra* note 69, at 1165.

[70] *See* General Comment 24, *supra* note 63 (noting "[w]hen there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed").

[71] *See* Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 936 (1986).

[72] *See* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[73] Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 45-46 (1994).

[74] *See* THE FEDERALIST No. 80, at 536 (Alexander Hamilton) (J. Cooke ed., 1961).

[75] Other justices have expressed similar sentiments more recently. Justice O'Connor has noted that, for U.S. lawyers, "understanding international law is no longer just a specialty. It is becoming a duty." Sandra Day O'Connor, *Keynote Address before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y INT'L L. PROC. 348, 353 (2002). *See also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999) (noting "comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights").

the nations of the earth, become amenable to the laws of nations, and it was their interest as well as their duty to provide, that those laws should be respected and obeyed."[76]

D. Mr. Padilla's Right Against Arbitrary Detention Is Not Only Due To His Citizenship

The prohibition against arbitrary detention under international human rights law is consonant with and complementary to well-established norms of United States law. Indeed, this Court's recognition of the importance of international human rights law to Mr. Padilla personally and to the questions of power implicated in this case better fit with our best traditions than any alternative approach.

The most basic proposition is that, "[i]n our society, liberty is the norm, and detention prior to trial is the carefully limited exception."[77] This Court has repeatedly confirmed the "general rule" of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial.[78] Preventive detention based on dangerousness has been upheld only when subject to strong procedural protections including, "proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards."[79]

The universality of human rights law supports recognition by this Court that it is not Mr. Padilla's

[76] *See Chisholm*, 2 U.S. at 474.

[77] *See United States v. Salerno*, 481 U.S. 739, 755 (1987).

[78] *See id.* at 749.

[79] *See Zadvydas*, 533 U.S. at 691 (*citing Salerno*, 481 U.S. at 747, 750-52).

citizenship that matters most. It is his humanity.[80] The fundamental protections of the Fifth Amendment "are universal in their application, to all persons within the territorial jurisdiction" of the United States.[81] As this Court has recently noted, "...the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[82]

Amici agree with the Second Circuit that the President's power is clearly "at its lowest ebb" in Mr. Padilla's case due to the Non-Detention Act,[83] which protects U.S. citizens.[84] We do not, however, believe that Presidential power to designate, detain, and isolate non-citizens in the United States and outside a zone of combat would be at a relevantly higher "ebb." The reasons for this derive both from the extensive statutory structure of U.S. immigration law and the constitutional rights of all persons within the United States.

Among the many cogent reasons advanced historically to support such a protective rule is a basic concern with the dangerous precedent that would be set by the allowance of government power to incarcerate *anyone*

[80] *See generally* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000); Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413 (2002).

[81] *See, e.g., Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments"); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). *See also Almeida-Sanchez v. United States*, 413 U.S. 266, 272-74 (1973) (Fourth Amendment protects noncitizens as to searches and seizures within the United States).

[82] *See Zadvydas*, 533 U.S. at 693; *see also Yick Wo*, 118 U.S. at 369.

[83] Non-Detention Act, 18 U.S.C. § 4001(a) (2000).

[84] *See Padilla v. Rumsfeld*, 352 F.3d 695, 711 (2d Cir. 2003) (*citing Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in result)).

without a bail hearing, based solely on accusation. As Thomas Jefferson—writing particularly to oppose the Federalists' Alien Friends Act, Alien Enemies Act, and Sedition Act[85]—warned, in 1798: "The friendless alien has indeed been selected as the safest subject of a first experiment, but the citizen will soon follow...."[86] Ironically, Jefferson's concern now may be at least as applicable to the dangers posed by executive designation of a citizen as an "enemy combatant" as it was to aliens more than two centuries ago.

E. International Human Rights Law Should Inform This Court's Analysis of the Scope of *Habeas Corpus* Review

Amici believe that the Second Circuit's construction of the propriety of attorney Newman's "next friend" status and the jurisdictional issues for purposes of Mr. Padilla's *habeas corpus* petition were correct as a matter of U.S. law and consonant with the broad mandates of international human rights law described above. However, we also urge this Court to adopt an expansive view of the scope of *habeas corpus* review in all such cases.

Nearly 200 years ago, Chief Justice Marshall noted that our judicial tribunals "are established . . . to decide on human rights."[87] That responsibility looms especially large today.[88] Much of the substance of international law,

[85] Alien Friends Act, ch. 58, 1 Stat. 570, 571 (1798) (expired June 25, 1800) (permitting the President to order any alien whom he judges "dangerous to the peace and safety of the United States" to leave the country without a hearing); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. §§ 21–23 (1999)) (permitting the President during war to apprehend, restrain, secure, and remove all enemy aliens without a hearing); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801).

[86] *See The Kentucky Resolution*, Documents of American History 181 (Henry Steele Commager ed., 6th ed. 1958).

[87] *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810).

[88] This Court has long considered the requirements of international law in cases such as this. In *Ex parte Quirin* the Court noted that "from the very

especially the *corpus* of human rights law, has changed dramatically since *Quirin* and *Eisentrager* were decided by this Court. Moreover, the scope of *habeas* review itself has evolved substantially since that time.[89] The *Quirin* Court, for example, rendered its decision against a background rule of *habeas corpus* review that was formally limited to determining whether court which had issued a judgment below lacked "jurisdiction."[90] This limitation has since been definitively jettisoned in favor of a much more expansive approach.[91]

The "Great Writ" has served as an important limitation on Executive power to detain since the beginning of the modern Anglo-American legal system.[92] Following

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beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." *See* 317 U.S. at 27-28. Although the *Quirin* Court concluded that an American citizen who had violated the laws of war could be treated as an "enemy combatant" and held without the full array of Constitutional rights, it is important to note that in that case the citizen, after consultation with legal counsel, had stipulated to the facts supporting the enemy combatant designation. In *Johnson v. Eisentrager*, as part of its determination whether a German national convicted by a United States military commission could pursue *habeas* relief, this Court comprehensively surveyed the relevant rules of international law. 339 U.S. 763, 785-788 (1950) (considering "the practice of every modern government," citing treaty law and Hague Regulations and secondary sources). *Eisentrager* concerned what amounted to post-conviction *habeas* relief. A tribunal had considered the legality of detention.

[89] *See generally*, A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV.309 (2003).

[90] *Id.* at 349.

[91] *See Brown v. Allen*, 344 U.S. 443, 533 (1955) (federal *habeas* relief extended to state court errors of federal constitutional law); *Fay v. Noia*, 372 U.S. 391 (1963), *overruled in part by Wainwright v. Sykes*, 433 U.S. 72 (1977).

[92] The writ of *habeas corpus* emerged in England as a means to limit the King's power to detain and to ensure that all detentions are legally authorized. The *Habeas Corpus* Act of 1679 supplemented the writ under common law and "afforded a powerful guarantee that individuals would not be detained on executive fiat instead of legally recognized grounds..." Subsequently, the *Habeas Corpus* Act of 1816 granted the

English precedent, *habeas* review has long extended to various types of executive detention.[93] Indeed, even enemy aliens convicted of war crimes during periods of declared war have obtained review under the writ.[94] In *INS* v. *St. Cyr*, this Court noted that, "[a]t its historical core, the writ of *habeas corpus* has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."[95]

Because "[t]he historic purpose of the writ has been to relieve detention by executive authorities without judicial trial," it is clear that the writ protects fundamental human rights, namely the rights to fair judicial review and freedom from arbitrary detention. [96] The writ holds a critical place in our legal system, serving as, "the precious safeguard of personal liberty."[97] Historically, *habeas* review has played the most critical role in times of emergency. As this Court has explained, "It is no accident that *habeas corpus* has time and again played a central role in national crises, wherein the claims of order and liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today."[98]

To serve this crucial historical purpose, *habeas* review of executive detention cannot be formalistic or rigidly cabined. The international human rights standard of meaningful review is a reasonable guide for this Court to follow. *Amici* thus strongly disagree with the assertion that

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court power to review the merits of the facts presented to justify detention. *See* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 563 (2002).

[93] *See* Brief *Amici Curiae* of Legal Historians in Support of Respondent at 16, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767).

[94] *See In re Yamashita*, 327 U.S. 1 (1948); *Ex parte Quirin*, 317 U.S. at 27-28.

[95] *See* 533 U.S. at 301.

[96] *See Brown v. Allen*, 344 U.S. 443, 533 (1955) (Jackson, J., concurring in result).

[97] *See Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

[98] *See Fay v. Noia*, 372 U.S. at 372 U.S. 391, 401.

"courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such."[99] The judiciary cannot simply rely on "the government's say-so."[100]

International legal bodies recognize the critical role *habeas corpus* review plays in ensuring compliance with human rights norms widely accepted throughout the world. As the Inter-American Court of Human Rights has noted:

> [*H*]*abeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.[101]

The human rights standard concerning judicial review demands contextual inquiry into whether detention is arbitrary. Judicial review must be fair and meaningful in cases alleging arbitrary detention.

The scope of *habeas* review has changed throughout history as understanding of the fundamental human rights on which it is based continues to evolve. "The great writ of *habeas corpus* has over the centuries been a flexible remedy adaptable to changing circumstances."[102] As this Court has noted, "[H]abeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes" and that "[t]he very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages

[99] *See Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (citing brief submitted by the government).
[100] *Id.*
[101] *See Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) No. 8, para. 35 (January 30, 1987); *see also Castillo Petruzzi Case, Merits, Judgment*, Inter-Am. Ct. H.R. (Ser. C) No. 52 (May 30, 1999).
[102] *See Regina v. Secretary of State for the Home Dep't, ex parte Muboyayi*, [1992] Q.B. 244, 269 (C.A.).

of justice within its reach are surfaced and corrected."[103] The writ of *habeas corpus* "cuts through all forms and goes to the very tissue of the structure" and "[i]t comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have more than an empty shell."[104]

The evolution of international human rights norms must inform our understanding of *habeas corpus* review in the modern era.[105] Thus, *habeas* review should include procedural due process inquiry into factual determinations by the Executive.[106] A detainee must be permitted to offer evidence in order for the fact finder to assess the validity of the detention. Detainees must have the right to counsel, as well as some reasonable form of compulsory process and access to exculpatory evidence of which the government may be aware. An extremely deferential "some evidence" standard is insufficient.[107]

In sum, if this Court were to determine that the President has the power to designate, arrest, isolate, and detain Mr. Padilla it should make clear that Mr. Padilla has a right to counsel and a right to contest all factual and legal aspects of his unprecedented situation. *Amici* also agree with Judge Wesley's statement below that the undefined nature of Mr. Padilla's detention is one of its "more troubling

[103] *See Hensley v. Municipal Court, San Jose Milpitas Judicial Dist., Santa Clara County, Cal.*, 411 U.S. 345, 350 (1973) (*citing Harris v. Nelson*, 394 U.S. 286, 291 (1969).
[104] *See Frank v. Magnum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).
[105] *See Garza v. Lappin*, 253 F.3d 918, 923 (7th Cir. 2001); *Rodriguez-Fernandez*, 654 F.2d at 1388 ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."); *Beharry*, 183 F. Supp. 2d at 601.
[106] *See* Raquel Aldana-Pindell, *The 9/11 "National Security" Cases: Three Principles Guiding Judges' Decision-Making*, 81 OR. L. REV. 985, 1043 (2002).
[107] *See Padilla ex rel. Newman v. Bush*, 233 F.Supp. 2d 564, 608 (S.D.N.Y. 2002), *adhered to upon reconsideration*, 243 F.Supp.2d 42 (S.D.N.Y. 2002).

aspects"[108] and that therefore a *habeas* court could determine whether his continued, indefinite detention is warranted.

[108] *See Padilla*, 352 F.3d at 733 (Wesley, J. concurring in part).

III. CONCLUSION

This case presents the Court with issues of the deepest historical importance. Its resolution of them will mark the boundaries of liberty for generations to come. As Justice Jackson once noted:

> [A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself ... The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need ... A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution....[109]

Amici believe that the judgment below should be affirmed. This Court should also take this historical opportunity to affirm well-accepted international human rights norms against arbitrary detention and to clarify the incorporation of those norms—which are consonant with our best traditions as a constitutional democracy—into the rule of U.S. law.

Respectfully submitted,

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[109] *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting) (citations omitted).

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DONALD RUMSFELD,

Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN,
as Next Friend of Jose Padilla,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF FRED KOREMATSU, THE BAR ASSOCIATION OF SAN FRANCISCO, THE ASIAN LAW CAUCUS, THE ASIAN AMERICAN BAR ASSOCIATION OF THE GREATER BAY AREA, ASIAN PACIFIC ISLANDER LEGAL OUTREACH, AND THE JAPANESE AMERICAN CITIZENS LEAGUE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are Fred Korematsu, the Bar Association of San Francisco, the Asian Law Caucus, the Asian American Bar Association of the Greater Bay Area, Asian Pacific Islander Legal Outreach, and the Japanese American Citizens League.[1] *Amici* all share an interest in defending the rights and liberties of individuals. One of the most important ways to ensure that individuals will enjoy their federal constitutional rights is by maintaining the delicate balance of power between all three branches of Government, even in exigent circumstances.

Amici share an interest in making sure that the Executive does not act alone in detaining American citizens on United States soil indefinitely, without charges or access to counsel. They fear that, by allowing the Executive Branch to decide unilaterally who to detain, and for how long, our country will repeat the same mistakes of the past. The maintenance and promotion of the delicate balance of power between all three branches of government is key to the missions to which *amici* are dedicated, and to avoiding the struggles that Mr. Korematsu and others have faced.

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[1] Under Rule 37.6, *amici* note the following: Both parties have consented to the filing of this brief. None of the parties to the case authored the brief. The law firms of Morrison & Foerster and Keker & Van Nest paid for all fees and costs associated with the drafting and filing of this brief.

Amici

A. Fred Korematsu

Mr. Korematsu challenged the constitutionality of Executive Order No. 34, one of a number of Executive Orders issued in early 1942 authorizing the internment of all persons of Japanese ancestry on the West Coast of the United States. He was convicted and sent to prison. His conviction was vacated 40 years later.

In 1998, when Mr. Korematsu was awarded the Presidential Medal of Freedom, he stated that "[w]e should be vigilant to make sure this will never happen again."[2] He is dedicated to ensuring that United States citizens not be detained without due process of law, and that our government not forget the slights of its past.

B. The Bar Association of San Francisco

The Bar Association of San Francisco is a nonprofit voluntary membership organization of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, the Bar Association of San Francisco enjoys the support of over 9,900 individuals, as well as 400 sponsor firms, corporations, and law schools.

Many of the events surrounding the internment of Japanese Americans, including the prosecution of Mr. Korematsu, occurred in the San Francisco Bay Area. Because those events are bound up with the history of the

[2] President Clinton's remarks at the Presidential Medal of Freedom Ceremony for Fred Korematsu on January 18, 1998 at http://www.medaloffreedom.com/FredKorematsu.htm.

San Francisco Bay Area during the Second World War, the Bar Association of San Francisco has a particularly strong interest in ensuring that the legal misjudgments that were made in connection with the exclusion orders do not occur again.

C. The Asian Law Caucus

The Asian Law Caucus is a non-profit organization providing legal services to all sectors of our society with a specific focus directed toward addressing the needs of low-income Asian and Pacific Islanders. The Asian Law Caucus, which was founded in 1972, is the nation's oldest legal organization addressing the civil rights of Asian and Pacific Islander communities. It is dedicated to the pursuit of equality and justice for all sectors of society.

D. The Asian American Bar Association of the Greater Bay Area

The Asian American Bar Association of the Greater Bay Area was founded in 1976 as a vehicle for Asian American attorneys to speak out on issues of concern to the community. With a membership of more than 500 attorneys, it is one of the largest ethnic bar associations in the nation and has participated in many amicus briefs in its 28 year history.

E. Asian Pacific Islander Legal Outreach

Asian Pacific Islander Legal Outreach is a non-profit, community-based organization that provides legal services. Formed in 1975 to provide legal advocacy to Asian and Pacific Islander communities in San Francisco and the

Bay Area, it is dedicated to breaking down the long-standing barriers which have denied Asian and Pacific Islander people equal justice and equal access to the legal system.

F. The Japanese American Citizens League

The Japanese American Citizens League ("JACL"), founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. During World War II, Japanese Americans were denied their constitutional rights and were incarcerated in internment camps by the United States for no reason other than their ethnicity and without individual review. Knowing the harm caused by discrimination and the importance of protecting our constitutional guarantees, JACL continues to work actively to safeguard the civil rights of all Americans. *Amici* thus has an important and substantial interest in this case.

SUMMARY OF ARGUMENT

The history of the detention of Japanese American citizens during World War II, and the legislation that followed, demonstrate that the Executive Branch does not have the unilateral power to detain an American citizen indefinitely, without charges or access to counsel.

The internment of 120,000 American citizens of Japanese descent during World War II was one of the darkest moments in American history. The American people have recognized that the indefinite detention of

these citizens, without charges, was not justified. Indeed, to prevent such acts, Congress repealed the Emergency Detention Act of 1950.

Now, we stand at another crossroads where we face the same question – what circumstances, if any, justify the indefinite detention of an American citizen for suspicious activities, without charges or access to counsel?

In answering this question, it is important to look back at the lessons this country learned from the summary incarceration of Japanese Americans, including this Court's decision in *Ex Parte Endo*, 323 U.S. 283 (1944), and the history of the Emergency Detention Act, which was modeled after Executive Order 9066, the most notorious of the Japanese-American exclusion orders.

Although the Emergency Detention Act afforded detainees far greater procedural protections than the rights that have been granted to Respondent, Jose Padilla, many members of Congress viewed that statute as incompatible with basic due process protections. Ultimately, Congress rejected the notion that repairing the statute by amendment would be sufficient. Instead, Congress repealed it and passed the Non-Detention Act, a key basis for the Second Circuit's decision in this case.

The Non-Detention Act specifically provides that no citizen may be detained without Congress' authorization. Here, there is no such authorization. Because Congress has not authorized the indefinite detention of Mr. Padilla, without charges or access to counsel, the Second Circuit was correct to order the issuance of a writ of habeas corpus.

Our system of divided constitutional government gives us ample protection against an Executive acting based on no authority but its own edicts. From time to time in our history, however, the judiciary has been called upon to reign in the Executive during moments of national crisis. Mr. Padilla's case arises during such a time. It is imperative that this Court uphold the delicate balance of power the Constitution envisions by requiring that the Executive seek congressional authority here.

ARGUMENT

I. THE EXPERIENCE OF AMERICANS OF JAPANESE ANCESTRY DURING THE SECOND WORLD WAR HIGHLIGHTS THE NEED FOR A DELICATE BALANCE OF POWER BETWEEN ALL THREE BRANCHES OF GOVERNMENT

A. Over Fifty Years Ago, The Country Detained 120,000 American Citizens in the Name of National Security.

The intense national reaction to the September 11 attacks is, in some ways, a virtual replay of the aftermath of Pearl Harbor sixty years earlier. One day after the bombing of Pearl Harbor, on December 8, 1941, Congress declared war against Japan.[3] Two months later, on February 19, 1942, the President issued Executive Order No. 9066, which:

[3] *Hirabayashi v. United States*, 320 U.S. 81, 85 (1943).

> [A]uthorized and direct[ed] the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.[4]

In response, General John DeWitt, the commander in charge of states along the Pacific Coast, designated much of the West Coast a "military area" on March 2, 1942.[5] On March 16, he also designated other "military areas" and proclaimed that future regulations and restrictions would apply to people remaining within those areas.[6] Congress then gave the President and military commanders the authority to impose certain restrictions within the designated "military areas." On March 21, 1942, Congress made it a crime for anyone "knowingly to disregard restrictions made applicable by a military commander to persons in a military area prescribed by him as such, all as authorized by an Executive Order of the President."[7]

[4] *Id.* at 85-86.

[5] *Id.* at 86-87.

[6] *Id.*

[7] *Id.* at 83.

General DeWitt issued several orders imposing severe restrictions on Americans of Japanese descent. All tolled, Executive Order No. 9066, Congress' statute, and General DeWitt's orders led to the removal and detention, without individual review, of approximately 120,000 people of Japanese descent.[8]

They also caused people of Japanese ancestry untold loss and suffering. Many had to sell their homes quickly, or just leave them behind.[9] Many lost their businesses and their standing in the community.[10] Those involved in the agricultural business lost everything.[11] After the war, when they were finally allowed to leave the relocation centers, their lives had been devastated, and they were left to try to rebuild.[12]

B. The Japanese-American Detention Cases Demonstrate that the Government's Indefinite Incarceration of Mr. Padilla is Unlawful.

During World War II, this Court in a series of cases addressed the severe restrictions imposed on American citizens of Japanese ancestry. Although several of those cases addressed the permissibility of the curfews and exclusions (including General DeWitt's March 24 and May

[8] Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 3 (Tetsuden Kashima ed., 1982).

[9] *Id.* at 117.

[10] *Id.*

[11] *Id.* at 122-127.

[12] *Id.* at 117.

3 orders),[13] only the decision in *Ex Parte Endo* addressed the validity of General DeWitt's May 7, 1942, order that all persons of Japanese descent were to remain indefinitely in relocation centers run by the War Relocation Authority.

1. In *Ex Parte Endo*, the Court Required That Any Implied Statutory Authority Be Interpreted Narrowly.

This Court ordered the release of an American citizen of Japanese ancestry in *Ex Parte Endo*, 323 U.S. 283 (1944), in part because there was no congressional authorization for indefinite detention.[14] During World War II,

[13] In *Hirabayashi* and *Korematsu*, the Court upheld the convictions of two individuals for curfew and exclusion order violations because it concluded that Congress and the Executive had acted together in concluding that these orders were necessary. *Hirabayashi*, 320 U.S. at 101 (curfew order); *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (exclusion order). Even these cases, which have been roundly discredited, cannot be used to support the position of the government, which has no authorization from Congress. *See* Bruce Ackerman, *The Emergency Constitution*, 113 Yale L.J. 1029, 1042-43 (2004) (observing that "[b]y the 1980s, it was hard to find a constitutional commentator with a good word to say for the [*Korematsu*] decision"); Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians – A Case Study*, 40 B.C. L. Rev. 275, 278 (1998) (noting that "it is widely accepted that the incarceration of Japanese Americans from the West Coast violated the constitutional rights of U.S. citizens and permanent residents"). As the Court in *Korematsu* noted, "[w]e cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with. . . . " 323 U.S. at 218. Here, the Executive has acted alone with no support from Congress in detaining a citizen for suspicion of committing future acts. Such unilateral actions are impermissible.

[14] *Ex Parte Endo*, 323 U.S. at 300-301, 304.

Mitsuye Endo was forced to leave her home in Sacramento, California and to remain in the Tule Lake War Relocation Center until the War Relocation Authority allowed her to leave.[15] In analyzing the permissibility of General DeWitt's order under Congress' statute and Executive Order No. 9066, this Court stressed that "the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government."[16]

The Court next set forth principles of interpretation that govern cases in times of exigency. It explained that "[w]e must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen."[17] More specifically, "[i]n interpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was *clearly* and *unmistakably* indicated by the language they used."[18]

Because Congress' statute was silent on the issue of indefinite detention, the Court looked to whether it could imply such authorization. In so doing, it explained that "any such implied power must be *narrowly confined* to the

[15] *Id.* at 288-89.

[16] *Id.* at 299.

[17] *Id.* at 300.

[18] *Id.* (emphasis added).

precise purpose of the evacuation program."[19] Because indefinite detention was not narrowly confined to protecting the war effort against espionage and sabotage, the Court ordered Ms. Endo's release.[20]

2. *Ex Parte Endo* Bars Mr. Padilla's Indefinite Detention.

As Petitioner notes in his brief, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[21] In other words, Congress limited the President's authority to use force to two instances. Congress gave the President authority to use force against nations, organizations or persons: (1) who planned, authorized, committed or aided the September 11 terrorist attack; or (2) who harbored organizations or persons who planned, authorized, committed or aided the terrorist attack.[22]

Under the well-settled principles this Court established in *Ex Parte Endo*, the language of the joint resolution must be examined to determine whether it either expressly or implicitly supports Mr. Padilla's detention.

[19] *Id.* at 301-302 (emphasis added).

[20] *Id.* at 302.

[21] Petitioner's Brief at 39 (citing Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, § 2(a) (2001)).

[22] *Id.*

"The government does not allege that Padilla was a member of al Qaeda."[23] Moreover, the government does not argue that Padilla was involved in the terrorist attacks that occurred on September 11. Nor does it claim that there is evidence that he harbored organizations or persons who planned, authorized, committed, or aided in those attacks. Instead, as the government concedes, Mr. Padilla is being detained because the government was concerned that he might commit *future* unlawful acts.[24] Just like the congressional statute in *Ex Parte Endo*, the joint resolution does not explicitly or implicitly support the government's detention here of persons whom the government believes *might* commit a future unlawful act.

II. THE EXPERIENCE OF AMERICANS OF JAPANESE ANCESTRY DURING THE SECOND WORLD WAR MOTIVATED CONGRESS TO ENACT THE NON-DETENTION ACT, WHICH BARS THE INDEFINITE DETENTION OF MR. PADILLA, INCLUDING BY MILITARY AUTHORITIES, WITHOUT CONSTITUTIONAL DUE PROCESS

In determining that Mr. Padilla's detention was impermissible, the Second Circuit relied in part on the Non-Detention Act, 18 U.S.C. § 4001(a), which was enacted to ensure that American citizens never again be detained indefinitely without due process. In order to understand the magnitude and scope of Congress' actions in enacting the Non-Detention Act, it is important to

[23] *Rumsfeld v. Padilla*, 352 F.3d 695, 701 (2d Cir. 2003)

[24] Petitioner's Brief at 4.

understand the Emergency Detention Act of 1950 and the historical context that led to its repeal. The decisions to repeal the Emergency Detention Act and to pass the Non-Detention Act were in large part caused by the nation's memories of the internment of Japanese-Americans during World War II.

A. The Emergency Detention of 1950 Authorized Detention in Certain Circumstances, But Afforded Greater Procedural Rights than Mr. Padilla Has Received.

Following World War II, and in the wake of the invasion of South Korea, Congress passed the Emergency Detention Act of 1950. The Act was enacted during a time of "great national hysteria and uncertainty," five years after the conclusion of World War II, while fears and "wild accusations" concerning communism were rampant.[25] In response to these fears, Congress passed the Emergency Detention Act that authorized the creation of camps modeled after those used to intern Japanese Americans several years before.[26]

[25] H.R. Rep. No. 92-234, at 66 (1971) (statement of Rep. Chester Holifield, member of Congress during enactment and repeal and co-sponsor of bill to repeal); *see also* Emergency Detention Act, § 101, formerly 50 U.S.C. §§ 811-26 (1970) (hereinafter "EDA"); H.R. Rep. No. 92-116, at 2 (1971).

[26] *See* http://www.trumanlibrary.org/whistlestop/study_collections/japanese_internment/1950.htm. Ironically, the six potential campsites designated by the Attorney General included those that had been used before, including Tule Lake, California. H.R. Rep. No. 91-1599, at 16 (1970).

Despite the general public support for such a measure, there remained dissenters who were concerned about the protection of civil liberties. For example, when the Emergency Detention Act was offered on the Senate floor as an amendment to the Internal Security Act, Senator Karl Mundt severely criticized it as "establishing concentration camps into which people might be put without benefit of trial, but merely by executive fiat."[27]

The Emergency Detention Act authorized the Executive Branch to detain United States citizens upon suspicion of espionage or sabotage during "Internal Security Emergenc[ies]."[28] Specifically, the Emergency Detention Act permitted the President, acting through the Attorney General to detain any individual, including a United States citizen, based on a reasonable suspicion that "such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage."[29] In order to invoke this authority, one of the following three events had to occur: (1) an invasion of the United States, (2) Congress' declaration of war, or (3) "[i]nsurrection within the United States in aid of a foreign enemy."[30] If any of these events occurred, the President was authorized to proclaim an "Internal Security Emergency," and such individuals could be apprehended and detained.[31]

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[27] H.R. Rep. No. 92-234, at 48 (statement of Rep. Spark Matsunaga quoting legislative history of the EDA).

[28] EDA § 102.

[29] *Id.* § 103(a).

[30] *Id.* § 102.

[31] *Id.* §102(b).

Although the Act gave the President broad authority to detain American citizens in this country, it also provided for certain procedural protections not made available to Mr. Padilla. These included the requirement that any person whom the Attorney General detained would be taken to a preliminary hearing officer "within 48 hours after apprehension," or as soon as practicable, for a finding of whether there was "probable cause for detention of such person."[32] Cause for detention could be established by demonstrating that the person *may* commit a crime. At the preliminary hearing, the detainee had the right to retain counsel.[33]

Following this administrative hearing, the detainee had the right to appeal a negative decision to a full administrative board,[34] as well as the Court of Appeals and, ultimately, to this Court.[35] In addition, the statute explicitly protected the detainee's right to challenge his detention by writ of habeas corpus.[36] It is noteworthy that, with all of its apparent faults, the Emergency Detention Act provided for greater procedural protections than the actions the Executive Branch undertook in this case, including access to counsel and notice of the charges and evidence brought forth against him.[37]

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[32] *Id.* § 104(d).

[33] *Id.* § 104(d)(2).

[34] *Id.* § 105.

[35] *Id.* § 111(f).

[36] *Id.*

[37] *Id.* § 104(d).

B. By Repealing The Emergency Detention Act and Enacting the Non-Detention Act, Congress Made Clear that the Executive Must Have Prior Congressional Approval Before Detaining an American Citizen on American Soil.

1. The Repeal of the Emergency Detention Act of 1950 and Enactment of the Non-Detention Act.

In 1970, Congress revisited the Emergency Detention Act in large part because of advocacy from various minority communities.[38] Members of the Japanese American population, whose memory of the internment camps was still fresh, continued to voice their concerns and fears about the statute.[39] Other racial minority groups, particularly the African American community, also objected to the Act, fearing that that the government would deem the civil rights movement and the resulting activities subversive.[40]

During the 91st Congress in 1970, proposed measures repealing the Emergency Detention Act and prohibiting the possibility of further detention camps were referred to the House of Representative's Committee on the Judiciary and Committee on Internal Security. In order to expedite the process and avoid redundancy, the House and Senate directed the House of Representative's Committee on

[38] H.R. Rep. No. 91-1599, at 11-12.

[39] H.R. Rep. No. 92-116, at 2. These groups included the JACL who actively participated in the congressional hearings. H.R. Rep. No. 92-234, at 95.

[40] H.R. Rep. No. 91-1599, at 11-12.

Internal Security to hold hearings on these issues. As a result, bill H.R. 19163 was introduced on September 14, 1970. Rather than repeal the act, the proposed measure merely added further procedural protections to the Emergency Detention Act.[41]

Less than a year later, the 92nd Congress revisited the issue. Again, various measures were sponsored and sent to the House of Representatives. This time, they were sent to the Committee on the Judiciary.[42]

During hearings, Committee members discussed the need to repeal the measure, and to add new restrictive language, lest the Executive Branch assume that the repeal was an authorization rather than a restriction on the ability to detain. For example, Representative Thomas Railsback explicitly raised the issue of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952),[43] stating:

[41] H.R. Rep. No. 92-116, at 3.

[42] *Id.*

[43] In *Youngstown*, this Court addressed the President's war powers. The Court held that the President did not have the power to seize steel mills during the Korean War because Congress had not authorized such seizures. 343 U.S. at 585. As the Court explained, the Executive Branch's powers "must stem either from an act of Congress or from the Constitution itself." *Id.*

Concurring, Justice Jackson explained that there are three ways to categorize the President's war powers. First, the President's powers are at their maximum where Congress has expressly or implicitly authorized his actions. *Id.* at 635. Second, where Congress has not either granted or prohibited the President's actions, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. Finally, the President's "power is at its lowest ebb" where, as is the case here, the President acts in a way that is contrary to the express or implied will of Congress. *Id.* at 637-38.

"Maybe we should do something affirmatively, other than just repeal, to make sure that we have restricted the President's wartime powers."[44]

The resulting congressional report recommended not only the repeal of the Emergency Detention Act, but also the adoption of stringent language limiting the power of the Executive Branch to detain citizens without congressional authority. The report strongly questioned the constitutionality of the Emergency Detention Act of 1950 and the scope of the executive authority to detain in light of Fifth Amendment due process rights:

> Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority. . . . The Committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an Act of Congress, exists.[45]

In addition, members of Congress expressed concern regarding whether the Emergency Detention Act violated constitutional guarantees by permitting "detentions not on the basis of an actual act committed in violation of law, but on the basis of mere suspicion – of a mere probability that, during proclaimed periods of international security emergencies, the detainee might engage in, or conspire with others to engage in acts of espionage or sabotage."[46]

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[44] H.R. Rep. 92-234, at 79.

[45] H.R. Rep. No. 92-116, at 5.

[46] 117 Cong. Rec. H31535 (daily ed. Sept. 13, 1971) (statement of Rep. Matsunaga).

The threat the Emergency Detention Act posed to established constitutional principles of criminal justice was aptly summarized by Representative Chester Holifield when he stated, "The law creates the following incredible situation: One person who actually commits sabotage or espionage will be accorded all of his fifth amendments rights – indictment, bail, a jury trial, confrontation of witnesses, compliance with rules of evidence, and full judicial review [in contrast to those who are detained under the Emergency Detention Act, who would have no such rights after being suspected of plotting such acts]."[47]

On September 25, 1971, after extensive hearings, Congress repealed the Emergency Detention Act of 1950 and enacted the Railsback amendment, commonly referred to as the Non-Detention Act,[48] which expressly limits the President's ability to detain American citizens on American soil.

2. The Non-Detention Act Bars Mr. Padilla's Indefinite Detention, Including By Military Authorities, Without Due Process.

The Non-Detention Act provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[49] As the Second Circuit held, because the plain language of the statute is

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[47] H.R. Rep. No. 92-234, at 68.

[48] Pub. L. No. 92-128, 62 Stat. 847 (1971).

[49] 18 U.S.C. § 4001(a) (2004).

unambiguous on its face, the judicial inquiry should end there.[50]

Not only does the plain language of the Non-Detention Act contemplate the present situation, where an American citizen is being detained on American soil, the Court has construed the language broadly. In *Howe v. Smith*, 452 U.S. 473 (1981), the Court construed the language literally as proscribing "detention *of any kind* by the United States, absent a congressional grant of authority to detain."[51]

Petitioner asserts that the legislative history indicates that the repeal of the Emergency Detention Act and the enactment of the Non-Detention Act were directed at the detention of citizens by civilian authorities. Based on this argument, he contends that the Second Circuit erred in relying on the Non-Detention Act because Mr. Padilla has been detained by non-civilian authorities. However, as Petitioner recognizes, in analyzing legislative actions, it is important to examine the backdrop of "'what Congress was attempting to accomplish in enacting'" the particular law and in light of the historical context in which it arose.[52] With that perspective, it is apparent that the distinction Petitioner attempts to draw between detention of citizens by civilian authorities versus military authorities does not survive judicial scrutiny.

[50] *Padilla*, 352 F.3d at 718.

[51] 452 U.S. at 479 n.3 (emphasis in original).

[52] Petitioner's Brief at 45 (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990)).

First, as discussed above, the detention of Japanese Americans during World War II was initially authorized under Executive Order 9066, pursuant to the President's authority as Commander in Chief. This unbridled exercise of executive authority is exactly what Congress intended to limit by repealing the Emergency Detention Act of 1950 and enacting the Non-Detention Act, as illustrated by the statements of Representative Railsback, the drafter of the Act, during subcommittee hearings, as well as during the hearings before the full session.[53] As the Second Circuit noted, the Non-Detention Act was enacted despite stated concerns by certain members of Congress that the Railsback amendment would be construed under this Court's case law, particularly *Youngstown*, to "prohibit even the picking up, at the time of a declared war, at a time of an invasion of the United States, a man whom we would have reasonable cause to believe would commit espionage or sabotage."[54] The President's authority as Commander in Chief is the same authority on which the government heavily relies to justify the executive order and the resulting indefinite detention of Mr. Padilla. Thus, Petitioner's attempt to distinguish the detention cases and the Non-Detention Act as applying only to the detention of American citizens by civilian authorities is misplaced.

In fact, as indicated above and as the Second Circuit discussed, the detention cases and the adoption of the

[53] 117 Cong. Rec. H31755 (daily ed. Sept. 14, 1971) (statement by Rep. Railsback) (suggesting that the President could seize citizens only pursuant to an act of Congress or during times of martial law when the courts were not opened).

[54] 117 Cong. Rec. H31549 (daily ed. Sept. 13, 1971).

Non-Detention Act support the position that the Executive Branch's exercise of authority in this case is unwarranted. "Because the World War II detentions were authorized pursuant to the President's war making powers as well as by a congressional declaration of war and by additional congressional acts, *see Endo*, 323 U.S. at 285-90, the manifest congressional concern about these detentions also suggests that section 4001(a) limits military as well as civilian detentions."[55]

Second, the legislative history of the Non-Detention Act demonstrates that one of Congress' primary concerns was to protect civil liberties, particularly those involving each citizen's Fifth Amendment due process rights. "The legislative history suggests that the main purpose of the Act was to prevent detention without due process of law, of citizens during internal security emergencies."[56] Indeed, one of the primary criticisms of the Emergency Detention Act of 1950 and reasons for its repeal was its lack of constitutional safeguards.[57]

Significantly, the procedural safeguards that the repealed Emergency Detention Act of 1950 provided were greater than those that have been afforded to Mr. Padilla.

[55] *Padilla*, 352 F.3d at 720; *see also* H.R. Rep. No. 92-234, at 45-46 (statement of Rep. Matsunaga, co-sponsor of H.R. 234) (emphasizing the dangers of the detention cases, including *Korematsu* and *Hirabayashi*).

[56] Jennifer K. Elsea, Congressional Research Service, *Detention of American Citizens as Enemy Combatants*, at 41 n.214 (citing H.R. Rep. No. 92-116 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435-39).

[57] H.R. Rep. No. 92-234, at 47-48 (statement of Rep. Matsunaga) (commenting that the Emergency Detention Act "effectively overrides due process").

They included a right to judicial review, a right to habeas relief, a right to know the charges being asserted, and a right to access to counsel. Moreover, one of three specific events (*i.e.*, Congress' declaration of war, the invasion of the United States, or an insurrection in aid of a foreign enemy) had to occur prior to a Presidential declaration of an "Internal Security Emergency."[58] Despite these protections, Congress deemed the Emergency Detention Act of 1950 unconstitutional due to concerns that it did not adequately protect the citizen's rights to due process of law.[59]

In light of the legislative history of the Non-Detention Act and the fact that the Emergency Detention Act provided greater protections for American citizens than those currently being afforded Mr. Padilla, it seems incredible to suggest that the 92nd Congress intended to permit the President to authorize the indefinite detention of a United States citizen without *any* right to counsel, to have charges brought, or to a timely hearing, by merely declaring such person an "enemy combatant." There is nothing in the legislative history to indicate that Congress intended such a draconian result.

C. Recent Congressional Actions Further Illustrate that the Non-Detention Act Applies to the Present Case.

Current members of Congress have recognized that the Non-Detention Act applies to the present case and

[58] EDA § 102(b).

[59] H.R. Rep. No. 92-116, at 4.

have attempted to act in accordance with the statute's requirements. Representative Adam Schiff has proposed a bill, entitled the Detention of Enemy Combatants Act, which would authorize the President to detain an enemy combatant "who is a United States person or resident who is a member of al Qaeda or knowingly cooperated with members of al Qaeda[.]"[60] In addition the bill establishes "clear standards and procedures governing detention of a United States person or resident,"[61] including "timely access to judicial review to challenge the basis for a detention" and "access to counsel[.]"[62]

In a statement released on February 20, 2004, Representative Schiff explained the purpose of the bill:

> After our experience with the internment of Japanese-Americans during World War II, we must be vigilant to protect against the government's decision to detain any American without adequate review of the basis of its decision. While we must grant broad latitude to our armed forces when it comes to protecting national security, American citizens should not be held indefinitely upon the sole determination of one branch of government.[63]

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[60] H.R. 1029, 108th Cong. (2003).

[61] *Id.* § 4.

[62] *Id.*

[63] Press Release, Adam Schiff, *Rep. Adam Schiff Urges Congress to Act on Enemy Combatants Issue in Wake of Supreme Court Decision to Hear Padilla Case* (Feb. 20, 2004) (noting that the Supreme Court had stepped in "[i]n the wake of Congressional inaction"), *available at* http://www.house.gov/apps/list/press/ca29_schiff/022004PdillaSupCt.html.

If enacted into law, H.R. 1029 would provide the congressional authorization required under the Non-Detention Act. The bill states: "By this Act, the Congress authorizes the President to detain enemy combatants who are United States persons or residents who are members of al Qaeda, or knowingly cooperated with members of al Qaeda in the planning, authorizing, committing, aiding or abetting of one or more terrorist acts against the United States."[64]

But Congress has not passed H.R. 1029, or any other legislation authorizing the detention of "enemy combatants." Thus, the President at present lacks the congressional authorization required under the Non-Detention Act. Regardless of how strongly the President may feel that Mr. Padilla is an "enemy combatant," he alone does not have unfettered authority to detain Mr. Padilla indefinitely, whether through civilian or military authorities.

III. "A CONSTANT CAUTION":[65] OUR COUNTRY CANNOT FORGET THE LESSONS LEARNED FROM THE DETENTION OF JAPANESE AMERICAN CITIZENS AND THE PASSAGE OF THE NON-DETENTION ACT

Time sometimes reveals the unforgivable nature of our actions. Many of our country's darkest episodes have occurred when we have failed to protect civil liberties during exigent times of war or in the name of national security. These failures are well-illustrated by the internment of

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[64] H.R. 1029, § 2(11)(12).

[65] *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

American citizens of Japanese descent on American soil during World War II.

At the time of the internments, the Court recognized that the Executive Branch could not act alone. It found that explicit congressional authority was necessary for such detentions.[66]

In passing the Emergency Detention Act of 1950, Congress recognized that, in order to detain its own citizens during exigent times, certain procedural protections were necessary. These constitutional protections included access to counsel, the right to timely review, and the writ of habeas corpus.

Then, in the 1970's, groups of citizens began voicing concerns that these protections were inadequate and could not justify the indefinite detention of American citizens. They expressed their fear of the possible ramifications of the Emergency Detention Act, *i.e.*, that during proclaimed periods of internal security emergencies, the government unilaterally could detain a citizen based on the "mere suspicion" that the detainee *may* engage in acts of espionage or sabotage.

Congress also recognized these concerns. Rather than amend the Emergency Detention Act to provide further procedural protections, Congress chose to repeal it. In doing so, Congress recognized that the arbitrary detention

[66] *Endo*, 323 U.S. at 300-01; *see also* Steven I. Vladeck, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153, 174 (2004) ("The Court, in a decision released on the same day as *Korematsu*, ordered Endo's discharge, largely because Congress had not explicitly authorized her confinement.").

of American citizens based on a proclamation by the President and an assortment of procedural protections was insufficient to protect the civil liberties and the freedoms at stake.

These realizations continued, as we as a nation turned inward and faced the realities of our past and how we had treated our own citizens.[67] On February 19, 1976, President Gerald Ford declared that "February 19th is the anniversary of a sad day in American history" because it was "on that date in 1942 . . . that Executive Order No. 9066 was issued."[68] He further asked "the American people to affirm with me this American Promise – that we have learned from the tragedy of that long-ago experience" and "that this kind of action shall never again be repeated."[69]

In 1980, Congress established a Commission on Wartime Relocation and Internment of Civilians to review the circumstances surrounding Executive Order No. 9066, and its impact on people of Japanese ancestry.[70] Comprised of former Congressional members, Cabinet members, and members of the Supreme Court, the Commission unanimously condemned the decisions

[67] Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 Stan. L. Rev. 755, 783 (2004) ("Congress has apologized for the Japanese detentions and paid compensation . . . . "); Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, 17 Crim. Just. 52, 56 (2002) (recounting the widespread regret for the internment of Japanese Americans).

[68] Proclamation No. 4417, 41 Fed. Reg. 35,7741 (Feb. 19, 1976).

[69] *Id.*

[70] Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied*.

justifying the internment of American citizens in this country.[71]

Later, a federal district court vacated the 1942 conviction of Fred Korematsu, one of the many excluded and interned Americans of Japanese ancestry, for violating General DeWitt's orders.[72] The court found that the government had failed to inform the Court of crucial evidence during the Second World War, which justified correcting Mr. Fred Korematsu's conviction under the stringent standard of coram nobis.[73] In so doing, the court noted that the *Korematsu* case "stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees."[74] It "stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."[75]

On January 18, 1998, President Clinton presented Mr. Korematsu with the Presidential Medal of Freedom. In doing so, the President praised Mr. Korematsu's "extraordinary stand" and noted that "[i]n the long history of our country's constant search for justice, some names of

[71] *Id.*

[72] *Korematsu*, 584 F. Supp. at 1420.

[73] *Id.* at 1419.

[74] *Id.* at 1420.

[75] *Id.*; *see also* Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A "Constant Caution" In a Time of Crisis*, 10 Asian L.J. 37, 45-50 (2003) (noting that the significance of the *Korematsu* decision endures, especially after the September 11, 2002 terrorist attacks).

ordinary citizens stand for millions of souls. Plessy, Brown, Parks . . . To that distinguished list, today we add the name of Fred Korematsu."[76]

CONCLUSION

Mr. Padilla has been indefinitely detained for almost two years without access to counsel or any communication with his family, based on the President's unilateral determination that Mr. Padilla is an "enemy combatant." No charges have been brought against him.

This detention is unwarranted and cannot be justified by the government's claims that we face a time of national crisis. No one can dispute the horror inflicted upon the nation on September 11. However, as illustrated by the Japanese American detention and the repeal of the Emergency Detention Act, it is imperative that we carefully balance our concerns for safety and security with the liberties afforded us in our Bill of Rights. As stated by the Court in *United States v. Robel*, 389 U.S. 258 (1967), "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."[77]

[76] President Clinton's remarks at the Presidential Medal of Freedom Ceremony for Fred Korematsu on January 18, 1998, *available at* http://www.medaloffreedom.com/FredKorematsu.htm.

[77] *Robel*, 389 U.S. at 264.

For the reasons set forth above, the judgment of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
PETITIONER,

- versus -

JOSE PADILLA, BY DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS and THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS as *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

The *National Association of Criminal Defense Lawyers* ["NACDL"] is a non-profit corporation with a subscribed membership of almost 11,000 national members, including military defense counsel, public defenders, private practitioners and law professors, and an additional 28,000 plus state, local and international affiliate members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.[1]

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of criminal justice and preserving, protecting and defending the adversary system and the U.S. Constitution.

The *New York State Association of Criminal Defense Lawyers* [NYSACDL], founded in 1986, is a not-for-profit corporation with a subscribed membership of approximately 1,000 attorneys. It is a recognized State Affiliate of the NACDL. Its goals and objectives are similar to NACDL's.

Amici have been involved as *amici curiae* at every stage of the proceedings below in both the District Court and Second Circuit on the issues herein. Our interest in this case arises due to the fact that the basic right of a citizen to legal counsel and to communicate freely with that attorney has been absolutely debilitated in this case. Furthermore, the constitutional basis for depriving a citizen of his liberty by the Armed Forces without any due process of law, is a matter of grave

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[1]No counsel for a party authored this Brief in whole or in part. No person, entity or organization other than the *Amici Curiae* made a monetary contribution to the preparation and submission of this Brief or to counsel.

constitutional concern - especially when such confinement is done in a matter that has now held the citizen in a military prison for almost ***two years***.[2]

STATEMENT OF FACTS

Jose Padilla is a U.S. citizen. He is a civilian - not a member of the U.S. Armed Forces or the Armed Forces of any other country. On May 8, 2002, Mr. Padilla was arrested in Chicago, Illinois upon a material witness warrant issued by the District Court, Southern District of New York. On or about June 9, 2002, per an *ex parte* Military Order of the President as Commander-in-Chief, Mr. Padilla was removed from the custody of the Justice Department and transferred to the custody of the Department of Defense and confined at the U.S. Naval Base Brig, Charleston, South Carolina, where he remains.

SUMMARY OF ARGUMENT

From the founding of our Country, military control over the civilian populace has been an anathema to our Constitutional system. The composite structure of the Constitution, to include the Bill of Rights, supports the basic concept of "civilian supremacy." The military order of the Commander in Chief confining Mr. Padilla - a civilian - indefinitely in a military brig, violates this basic principle.

Not only has Mr. Padilla been imprisoned for almost two years as a *military* prisoner, he remains at all times *uncharged* with any crime, civilian or military. As a civilian, Mr. Padilla cannot *constitutionally* have military law applied to him. The only exception - legally and historically - would be the application of *martial law* to Mr. Padilla. Martial law however has not been declared, nor does any factual exigency or emergency exist such as to justify or necessitate it.

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[2]Counsel for the Parties have consented to *Amici* filing this Brief and such have been filed with the Court.

The Authorization for the Use of Military Force enacted by Congress on September 14, 2001, was a *limited* delegation of Congressional war power to the Commander in Chief. That delegation did not however, authorize the Commander in Chief to either designate a U.S. citizen, *not* a member of the armed forces of any country, as an "unlawful combatant," nor did it authorize the indefinite military detention of a U.S. citizen without charges.

Rather, the scope of the Joint Resolution which Petitioner relies on for justification, must be evaluated within the broad parameters of other Congressional enactments, specifically precluding the actions of the Petitioner herein and prohibiting the use of our military against our citizens domestically. The *Posse Comitatus* Act of 1878, 18 U.S.C. § 1385, was not repealed or excepted. Title 18, U.S.C. § 4001(a) [prohibiting "preventive detention" of citizens], was not modified, nor was 10 U.S.C. § 375 [prohibiting "direct participation" by military forces of "seizure, arrest or other similar activity" in law enforcement actions].

Both the Constitution and statutory authority - authority with specific lineage to Article I, § 8, U.S. Constitution - forbid the indefinite *military* detention of a civilian, U.S. citizen without charges for almost two years. There is no authority, express or implied, in Article II of the Constitution, that sustains Petitioner's arguments. *Habeas corpus* is and respectfully must be, the remedy.

ARGUMENT

I. THERE IS NO LEGAL AUTHORITY FOR THE COMMANDER-IN-CHIEF TO IMPRISON A CIVILIAN, CITIZEN IN A MILITARY PRISON, ABSENT MARTIAL LAW.

A. Overview.

Our Republic and the democracy that we enjoy, *i.e.*, a government "of the People, by the People, and *for* the People,"

did not come easily. As history shows, the United States was conceived in terroristic acts that evolved into a full-scale, military revolution. The "wars" with Native Americans, the Boston Massacre, Lexington and Concord and the ensuing siege of Boston all contributed to our Revolutionary War. Indeed, one of the chief complaints of the "Colonists," against the British Throne was, according to our *Declaration of Independence,* ". . . He has affected to render the Military independent of and superior to the Civil power. . . ."[3]

Amici Curiae emphasize this history because of its contextual relevance - the Framers of our Constitution were acutely aware of the dangers of surprise attacks as well as full-scale war. The military presence and oppression of King George III's armies were precipitating factors leading to war. Indeed, "terrorism" was a specific concern:

> "He has excited ***domestic insurrections*** amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, ***whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions***."[4]

It was with this background that our Constitution was born and from which it must be interpreted.

Those events were fresh in the minds of the citizenry when our Constitution was drafted, debated and ratified. The "civilian supremacy" influence permeates the document itself, *viz.*: Article I, § 8: Congress (civilians) regulates the military, declares war, etc.; Article II, § 2: The President (a civilian) is the Commander in Chief of the military; The Third Amendment: Citizens cannot be forced to "quarter" the military during peacetime, and only in a manner prescribed by law during war; The Fifth Amendment: The right to indictment by Grand Jury applies to all citizens "except in cases arising in

[3]http://www.archives.gov/national_archives_experience/declaration_transcript.html [last accessed, April 6, 2004].

[4]*Ibid.* [emphasis added].

the land or naval forces. . . ." *i.e.,* the military.

Thus, the core constitutional concept is one of civilian control over the military. Or, conversely: "The established principle of every free people is, that the law shall alone govern; and to it the military must always yield." *Dow v. Johnson,* 100 U.S. 158, at 169 (1879).

Amici Curiae submit that the *military* "order" here indefinitely confining Mr. Padilla by the military as a ***civilian,*** U.S. citizen in a military prison without charges, is simply unlawful. His *continued* military imprisonment is therefore, unconstitutional. *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991). While we recognize the constitutional tensions implicit in claiming illegality of the Commander in Chief's order under separation of powers concepts, it is indeed both the constitutional role and function of the judiciary under Article III, of the Constitution, to interpret the Constitution. *Marbury v. Madison,* 5 U.S. 137 (1803), both addresses and resolves this issue. It is the position of the*Amici* herein that the seizure and *continued* imprisonment of the Respondent violates the basic premise of civilian supremacy prohibiting military control over civilian citizens. This is especially so where Congress has repeatedly and *expressly* exercised its Article I, § 8 powers, *viz.,* in the *Uniform Code of Military Justice,* 10 U.S.C. § 801 *et seq.,* ["UCMJ"], the *Posse Comitatus Act,* 18 U.S.C. § 1385, and other statutes discussed hereinafter, laws that the President is Constitutionally bound to follow and "execute."

Amici Curiae would note that the Court *could* avoid the Constitutional conundrum of whether or not the Congressional *Authorization for the Use of Military Force,* P.L. 107-40, 115 Stat. 224 (2001), authorizes the President's military *detention* of Mr. Padilla in a constitutional manner, by focusing on the constitutionality of Padilla's *continued* military incarceration for almost two years absent any "charges" or other Due Process protections.[5] During the Civil War President Lincoln

[5]*Amici* do not concede this issue, but merely posit it to the Court in our (continued...)

unilaterally suspended the *privilege* of the Writ of *Habeas Corpus* and ordered a military blockade of Southern ports because Congress was not in session. Lincoln thereafter sought Congressional "ratification" for his actions, something that has *not* done here.[6] Thus, whether or not Congress has authorized (or constitutionally *could* authorize without suspending the Writ of *Habeas Corpus*) a military detention of a U.S. citizen need not be reached by this Court *if* Mr. Padilla's *continued* military detention is unconstitutional as violative of Due Process. *See generally, Duncan v. Kahanamoku*, 327 U.S. 304 (1946) [no factual necessity for continued martial law] and *Zadvydas v. Davis*, 533 U.S. 678 (2001) [no clear Congressional intention for indefinite detention of alien].

B. "Military" Law Does Not Apply to Mr. Padilla.

Necessary definitions relevant herein are as follows:

Military Law. "[T]he exercise of that branch of the municipal law which regulates its military establishment."[7] Here, it is the *Uniform Code of Military Justice* ["UCMJ"],[8] and its implementing regulations.

Martial Law. "A government temporarily governing the civil population within its territory or a portion of its territory through its military forces as necessity may require."[9]

A fortiori Mr. Padilla, a United States citizen who is not a member of the United States military, cannot Constitutionally

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[5](...continued)
capacity as *amici curiae* as a conceptual alternative to the Parties' positions.

[6]*See* 12 Stat. 326 (1861)[blockade], and 12 Stat. 755 (1863) [*Habeas Corpus* suspension].

[7]Paragraph 2, page I-1, *Manual for Courts-Martial (2002 Edition)* [Washington, DC: GPO][hereinafter "MCM"]. The MCM is an Executive Order.

[8]10 U.S.C. § 801 *et seq.*

[9]MCM, paragraph 2, page I-1.

have *military law* applied to him under the present circumstances. Furthermore, since "martial law" has not been declared (nor could it be at this juncture)[10], no ***military*** authority constitutionally exists to confine the Respondent.

The actions of the Commander in Chief must be viewed through the constitutional limitations placed on that office, versus that of the President in general. [11] The "power" of the President is simply not at issue in this case because the basis of the illegal confinement is a *military* order of the Commander in Chief.[12] The Petitioner's position herein, *viz.*, that the Commander in Chief has unfettered detention authority by virtue of issuing a *military* order, is simply wrong. It is also unconstitutional as *Little v. Barreme*, 6 U.S. 170 (1804), makes clear. *Little's* basic premise is respectfully controlling herein. There Congress delegated certain limited "war powers" to the Executive [compare the *Authorization for Use of Military Force*]. However, in implementing that delegation the President issued a *military* order exceeding the scope of the delegation [*compare* the military order indefinitely confining Padilla]. This Court held in *Little* that the order was *ultra vires* and respectfully, should do so herein.

Finally, when it comes to interpreting the Constitution, as *Marbury v. Madison, supra*, and its progeny teach, it is the duty of the Judiciary - not the Commander in Chief - to do so. And, as *United States v. Nixon*, 418 U.S. 683 (1974), illustrates, no man - to include the President - is above the law. *See also, Sterling v. Constantin*, 287 U.S. 378 (1932).

C. There is No Historical Precedent for the Commander in Chief's Action Herein.

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[10]*See, Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

[11]*Cf. The War Powers Resolution*, 50 U.S.C. § 1541 *et seq.*

[12]Indeed, by *fiat* the Commander in Chief has created a classic *Bill of Attainder* against the Respondent herein. *See* Article I, § 9, cl. 3, U.S. Const. *Compare, United States v. Brown*, 381 U.S. 437 (1965).

Absent a formal, Congressional declaration of war,[13] or the lawful imposition of martial law, the Commander in Chief's military authority is limited by the Constitution's terms. The *Federalist Papers* demonstrate that the drafters of our Constitution, firmly rejected the concepts claimed by the Commander in Chief herein.[14]

Hence, a suspicion of Executive encroachment - both as to power and as to liberty - was clearly of prime concern to the Drafters. Indeed, while providing for a system of government with a "separation of powers," it also wisely provided for a Constitutional system of "checks and balances." It is thus clear constitutionally, that the Commander in Chief cannot *now sua sponte* assume military powers neither enumerated within the text of the Constitution, nor expressly delegated by the Congressional "War Power."

Alexander Hamilton, the author of *Federalist, Number 69,* entitled, *The Real Character of the Executive,* stated:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, ***but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy;*** while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, ***all which, by the Constitution under consideration, would appertain to the legislature.*** [Emphasis added].[15]

It is therefore abundantly clear that the Framer's view of the Commander in Chief's power was limited and again, the War Power clearly resided and remained with the Congress - absent a true and sudden "emergency,"[16]

D. The Historical, Subservient Role of the Military.

In 1792, Congress passed the *Militia Act*[17], authorizing the President to federalize the State Militias in the event of certain domestic contingencies. In 1794, the so-called *"Whiskey Rebellion"* in Western Pennsylvania, required action. Pursuant to the *statutory* authority (which required a form of "probable cause" by a jurist), President Washington ordered the mobilization of the Militia to suppress the insurrection. Yet, in his "Military Order" he made no effort to interfere with the Judiciary, indeed he commanded the troops:

> You are to exert yourself by all possible means to preserve discipline amongst the troops, particularly a scrupulous regard to the rights of persons and property, and a respect for the civil

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[13]The Joint Congressional "Authorization for Use of Military Force," *supra,* is *not* a Declaration of War, nor does it suspend *habeas corpus*, nor authorize the indefinite military detention of a civilian citizen. It offers no authority for the Petitioner herein.

[14]In *Federalist, No. 48,* Madison observed:

> In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, ***the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire.*** [Emphasis added].

http://memory.loc.gov/const/fed/fed_48.html [last accessed, April 5, 2004].

[15]http://memory.loc.gov/const/fed/fed_69.html .

[16]The facts here belie any claim of "emergency" such as experienced by Lincoln. Here, Padilla was arrested in Chicago, taken to New York City, arraigned, had counsel assigned and was engaged in litigating his "material witness" status, when roughly one *month* later, the decision to *militarily* imprison him indefinitely was made.

[17]1 Stat. 271; *see also* 1 Stat. 424 (February 28, 1795).

magistrates . . . .[18]

Washington clearly understood that his power as Commander in Chief was limited and depended upon Congressional authority. While the military made numerous arrests, detentions and prosecutions were handled by the civilian court system.

As early as 1807, this Court addressed the issue in *Ex Parte Bollman,* 8 U.S. 75 (1807). Bollman and others were arrested by the Army and charged with treason. The military, on orders from President Thomas Jefferson, turned the prisoners over to the jurisdiction of the federal court in the District of Columbia, who then detained them. The prisoners sought *habeas corpus* relief. This Court granted the *writs* and noted that only Congress could order the suspension of the writ of *habeas corpus.* Absent that, it was up to the Court to decide the merits of the petition for *habeas* relief - the very issue herein.

One of the earliest American commentators on "military law," in 1846, rejected the Petitioner's arguments advanced herein and he was a military officer!

> ***The substitution of this power [martial law] for the civil courts, subjects all persons to the arbitrary will of an individual, and to imprisonment for an indefinite period . . . .***
>
> Now, to guard against such abuse, the constitution guarantees the privilege of the writ of *habeas corpus . . .* ***and the intervention of congress is necessary before such suspension can be made lawful.***. . . . Mr. Justice Blackstone says, "but the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient, for it is the parliament only . . . that . . . can authorize the crown, by suspending the *habeas corpus* act . . . to imprison suspected persons without giving any reason for so doing" [Emphasis added][19]

In May of 1861, Merryman (a civilian) was arrested by the U.S. Army. He was placed in military confinement at Fort McHenry. No charges - civilian or military - were lodged against him, and a "copy of the warrant or order under which the prisoner was arrested was demanded by his counsel, and refused . . . ." *Ex Parte Merryman,* 17 Fed. Cas. 144, at 147 (C.C. D. Maryland, 1861). His attorney then sought a writ of *habeas corpus* and Chief Justice Taney, as Circuit Judge heard the case. The Commander of the Fort, refused to comply with the writ, citing President Lincoln's *unilateral* decision to suspend the writ. In his decision ordering Merryman's release (which Lincoln ignored), Chief Justice Taney noted that the specific language of Article I, § 9, of the Constitution, gives Congress alone the power to suspend the writ.

Chief Justice Taney's *Merryman* opinion in the abstract, probably comported to the Framer's intent. However, in practice, he failed to address *two* salient facts: Congress was *not* in session at the time (unlike Mr. Padilla's on-going situation); and Merryman was physically in a zone of active and on-going military hostilities.[20]

Two years after *Merryman, supra,* this Court decided the *Prize Cases,* 67 U.S. 635 (1863), involving a naval blockade of Confederate ports and the seizure of foreign vessels. What is generally overlooked is that first, at the time of President Lincoln's order, Congress was not in session, and

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[18]As quoted in Frederick B. Wiener, *A Practical Manual of Martial Law,* (Harrisburg, PA: The Military Service Pub. Co., 1940), at 103. Indeed, Washington also sent the federal district judge and the United States Attorney along, *id.,* at 55.

[19]William C. DeHart, Captain, U.S. Army (Acting Judge Advocate of the Army), *Observations on Military Law* (NY: Wiley & Halsted, 1859 ed, copyrighted 1846) [reprinted in 18 *Classics in Legal History,* Wm. S. Hein & Co, Buffalo, NY, 1973], at 17-18.

[20]Chicago may be many things, but at the time of Padilla's arrest on May 8, 2002, it was *not* a military battle zone. Nor was New York City a "combat zone" the day Padilla was placed into *military* custody, June 9, 2002.

second, Lincoln sought and received Congressional ratification for his initial, emergency blockade order. 67 U.S. at 670-71; 12 Stat. 326 (1861). Thus, the "war power" of the Commander in Chief ultimately flowed from Article I, and the Congress. Lincoln acted "extra-constitutionally" in a time of imminent crisis *and* on-going military engagements.[21]

Ex Parte Milligan, 71 U.S. 2 (1866), resolves the matter *sub judice*. Without express *Congressional* action, a United States citizen cannot be detained or imprisoned by the U.S. military, absent a *bona fide* existence of martial law. Milligan, a civilian was granted *habeas corpus*, after arguing that the military (in a non-battle zone) had no jurisdiction to detain or try him.

> ***Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power"*** -- the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence.[22] [emphasis added]

Milligan was not an aberration of military jurisprudence, as is implicit from the writings of that century's greatest military law scholar, Colonel William Winthrop, U.S. Army. In his seminal work, *Military Law and Precedents*, 2nd ed. (Washington, DC: Gov't Printing Office, 1920) [Legal Classics Library reprint], at 891; he notes the following:

> Where . . . an officer of the army is served with a writ of *habeas corpus* issuing from a court of the *United States*, he will make full return of the same . . . and on the return day will appear with the body of the petitioner before the court ***to abide by its order thereupon.*** [emphasis added in bold].

That concept was followed by the military through World War II. In a treatise by Colonel Lee S. Tillotson, JAG Dep't, U.S. Army (ret.), *The Articles of War Annotated*, (Harrisburg, PA: The Military Service Pub. Co., 1942), the author states in a section headed, "HABEAS CORPUS:"

> "34. **In a case of disputed jurisdiction over a person subject to military law, as between the civil and military courts, the question should be raised by writ of *habeas corpus* in a Federal Court.** The military authorities must recognize such writ and surrender the body of the person wanted in response thereto, ***leaving the whole question to be decided by the court from which the writ issued."*** *Id.*, at 163 [Emphasis added].

Rather than any "due deference" argument to the Commander in Chief, it is quite clear that the military itself was under the correct constitutional construct that they, the military, must give "due deference" to the jurisdiction of the federal courts, and indeed, that such courts were the proper forum to decide "disputed jurisdiction."

The Court next visited this area of military jurisprudence in *Ex Parte Quirin*, 317 U.S. 1 (1942). Indeed, that is the judicial d.am that the Petitioner is beating loudest, for that is his stated basis for categorizing the Respondent as an "unlawful combatant." However, even that claim is not historically accurate from a military perspective.

Colonel Winthrop recognized what he termed, "uncivilized combatants," those who do not respect the laws of war. Thus,

> Not being within the protection of the laws of war, they were treated as criminals and outlaws, not entitled upon capture to be held as prisoners of war, liable to be shot, imprisoned or

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[21] For an exceptional analysis of the "ratification" process in the *Prize Cases*, *see*, J. Randall, *Constitutional Problems Under Lincoln*, rev. ed. (Urbana, IL: Univ. Illinois Press, 1951), pp. 52-58. *See also* D. Farber, *Lincoln's Constitution* (Chicago: Univ. Chicago Press, 2003), pp. 127-138.

[22] 71 U.S. at 124-25.

> banished, either summarily where their guilt was clear or upon trial and conviction by military commission. Winthrop, *op cit.*, at 784.

Winthrop's observations however must be kept in the context of what he was describing - combatants who either were captured or surrendered on the battlefield, *i.e.*, "caught in the act" guilty, ***could be*** dealt with *summarily* - otherwise they were tried.[23]

Quirin is a judicial anomaly and of limited value once one actually understands the case.[24] It was undisputed that (a) the United States was in a "declared" war with Germany; (b) that all eight defendants were members of the *uniformed* German military; (c) they were on an actual military mission (having been brought to the U.S. via German U-Boats); and (unlike Padilla) (d) all were facing criminal charges under military law.

Attorney General Biddle's claim that the Commander in Chief had "absolute" power over the "enemy," was ***not*** adopted by the Court. Petitioner now cites *Quirin* for the proposition that even U.S. citizens could be held as "unlawful enemy combatants," but a closer reading does not support that broad proposition and to the extent that the Court's opinion comments on it, it is clearly *dicta*. The issue of citizenship was in reality a non-issue, simply because it was clear that all of the saboteurs were members of the German Reich's military forces, *not* civilians.[25] None of this has any relevance to the case

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[23]George Washington set the precedent for trying spies, rather than summarily executing them. When British Major Andre (the collaborator with Benedict Arnold) was captured behind American lines, in civilian clothes, Washington ordered a military trial. This is discussed in *Ex Parte Quirin*, 317 U.S. 1, at 31, fn. 9 (1942).

[24]For the most comprehensive and recent legal analysis of the case see, Louis Fisher, *Nazi Saboteurs On Trial* (Lawrence, KS: Univ. Press of Kansas, 2003).

[25]Indeed, what knocks *Quirin's* prop out from under Petitioner's claims is that the ***civilian*** co-defendants to the ***Quirin military*** case, were all indicted (continued...)

herein and therefore, *Quirin* stands for nothing when there is no declared war, when there is no issue as to "citizenship," indeed, when there are no charges period pending against the Respondent. The *Quirin* military defendants were charged and tried - not placed into some indefinite military legal limbo.

Quirin, as modern precedent also suffers from some additional problems - first, Congress in passing the *Uniform Code of Military Justice* [UCMJ],[26] in 1950, engaged in a comprehensive overhaul of military law, something Article I, § 8, clearly gives them the power to do. Second, the 1949 Geneva Conventions were obviously adopted post-*Quirin*, so that court never considered them or their impact on domestic law here in the United States. Third, more recently ratified U.S. treaties, *e.g.*, the *International Covenant on Civil and Political Rights*,[27] ["ICCPR"] of which the United States is a signatory, supercedes any efficacy *Quirin* ever had regarding arbitrary and indefinite military detentions.[28]

One of the anomalies of this Court were the Japanese Evacuation and Internment Cases from the West Coast, after the Pearl Harbor attack. On February 14, 1942, the President issued Executive Order # 9066, essentially forcing West Coast Japanese Americans into concentration camps unless they

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[25](...continued)
and tried in *federal* court. *See, Cramer v. United States*, 325 U.S. 1 (1945); and *Haupt v. United States*, 330 U.S. 631 (1947). *See,* L. Fisher, *op cit.*, at 80-84.

[26]10 U.S.C. § 801, *et seq.*

[27]G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976; available on-line at: http://www1.umn.edu/humanrts/instree/b3ccpr.htm.

[28]The ICCPR provides:

> ***Article 9, Section 4:*** Anyone who is deprived of his liberty by arrest or ***detention*** shall be entitled to ***take proceedings before a court***, in order that court may decide without delay on ***the lawfulness of his detention*** and order his release if the detention is not lawful." [emphasis added].

voluntarily "relocated." However, before the Constitutionality of this Order could be challenged, Congress ratified it. *See,* 56 Stat. 173 (1942). A number of cases ultimately reached this Court, which generally upheld these actions as proper "war measures." *See Hirabayashi v. United States,* 320 U.S. 81 (1943); and *Korematsu v. United States,* 323 U.S. 214 (1944). *See also Ex Parte Endo,* 323 U.S. 283, at 300 (1944).[29]

The convictions however, were procured by fraud and their ***only*** relevance today is that courts should be highly skeptical of any claims from the Commander in Chief arguing "military necessity." In *Korematsu v. United States,* 584 F.Supp 1406 (N.D. Cal. 1984), the Court granted a writ of *error coram nobis* and reversed Korematsu's conviction. The basis was the Government's *misrepresentation* during the case of the existence of "intelligence" purporting to establish a military necessity for the evacuation orders in the first place.[30] *See also, Hirabayashi v. United States,* 627 F.Supp 1445 (W.D. Wash. 1986) [reversing in part some of his convictions].[31]

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[29]Ms. Endo was freed in part because the Congressional ratification of the Executive Order in question did not "use the language of *detention.*" Neither did the Joint Resolution herein. Furthermore, there has been no Congressional ratification herein of the "military order" detaining Padilla, unlike *Endo* and the *Prize Cases. Amici* would note, consistent with *INS v. St. Cyr,* 533 U.S. 289 (2001), that if Congress had *any* desire to restrict *habeas* jurisdiction, as Petitioner argues is implicit from the Use of Military Force Resolution, *supra,* it would have done so when it enacted the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[30]For a comprehensive review of this sordid process, *see* Peter Irons, *Justice at War* (NY: Oxford Univ. Press, 1983), where the author documents and traces the government's misconduct; *e.g.,* "[P]resenting to the Supreme Court a key military report that contained 'lies' and 'intentional falsehoods.'" *Id.* at ix. During "Watergate," according to U.S. District Court Judge Sirica, *false* claims of "national security" were proffered to the Court as a basis to avoid complying with Grand Jury subpoenas. J. Sirica, *To Set the Record Straight,* (NY: W.W. Norton & Co., 1979), at 155.

[31]The misrepresentations of various Commanders in Chief exercising their purported "war power," has been extensively documented. *See, e.g.,* H.R.

(continued...)

Duncan, supra, is like *Milligan*, respectfully submitted as controlling. A civilian convicted in Hawaii long after the need for martial law expired (the Courts were open and functioning), it was thus under the precedent of *Milligan*, unconstitutional to try a U.S. civilian by a military tribunal. Therefore, *habeas corpus* was granted as the military had no authority to hold the "prisoner." Similarly, there is no lawful authority for the military to continue its detention of Mr. Padilla under the totality of circumstances herein.

Finally, the core reason that the Petitioner's arguments must fail stems from *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952). This is the seminal case discussing the Constitutional *limitations* on the President's perceived "War Power." The Court itself held that even in times of a national emergency, the President lacked any independent legal basis to seize corporations for the "war effort" in the face of express Congressional prohibitions.[31] Clearly, if the President cannot seize a corporation even as Commander in Chief, he cannot invest himself with the authority to seize and detain a U.S. citizen, contrary to the Fourth and Fifth Amendments.[32]

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[31](...continued)
McMaster, Major, U.S. Army, *Dereliction of Duty: Lyndon Johnson, Robert McNamara, The Joint Chiefs of Staff, and the Lies that Led to Vietnam* (NY: HarperCollins, 1997); Sirica, *op cit.*

[31]Similar specific prohibitions exist herein. *See* Point II, *infra.*

[32]This interpretation is consistent with *Henkels v. Sutherland,* 271 U.S. 298, at 301 (1926), where the Court held, "With enemy-owned property . . . the United States may deal as it sees fit [citation omitted]; ***but it has no such latitude in respect of the property of an American citizen.***" [Emphasis added]. Again, if the enumerated "war power" of Congress cannot be used to seize ***property*** of a civilian citizen, surely it cannot be used to *seize* the Person of the Respondent herein. *See also, Mitchell v. Harmony,* 54 U.S. 115, 134 (1852) [U.S. Army officer illegally seized property of U.S. citizen during war with Mexico, "the emergency must be shown to exist before the taking can be justified."], and *United States v. Russell,* 80 U.S. 623, 628 (1972) [steamship commandeered by Union forces in 1864, same].

Justice Jackson's concurring opinion[33] bears repeating as he traces the history of the Chief Executive's power - in war and peace:

> There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. ***He has no monopoly of "war powers," whatever they are.*** While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command.
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> * * *
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> His command power is . . . subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. ***The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. . . . What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.*** 343 U.S. 643-46.

Justice Jackson next addressed the claimed "emergency" doctrine:[34]

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[33]*Cf., Dames & Moore v. Regan,* 453 U.S. 654 (1981).

[34]Unlike Lincoln's *bona fide* emergency - there was a war going on literally in his back yard - *Youngstown's* "emergency" was the President's perceived need to control steel production during the Korean War. Lincoln sought Congressional ratification from Congress, Truman chose to ignore (continued...)

> The appeal, however, that we ***declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted.*** They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of *habeas corpus* in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. . . . ***Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers.*** 343 U.S. at 650-51 [Emphasis added].

In a *habeas corpus* case involving a *former* member of the military, but a civilian at the time of his arrest, the Court in *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955), held that the military could *not* exercise any jurisdiction over civilians, even for crimes committed by that person while serving on active duty. In striking down a provision of the *Uniform Code of Military Justice*, the Court also noted that, "this assertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law." 350 U.S. at 14 [citing *Milligan*]. Plainly, if neither Congress nor the Commander in Chief can lawfully obtain jurisdiction over a civilian, former military member for specific criminal acts, that cannot under any interpretation or

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[34](...continued)
legislative history *rejecting* seizure under the circumstances that existed.

extrapolation of the law confer any "jurisdiction" to the Commander in Chief over Respondent herein.

Thus, Petitioner is faced with the case of *Reid v. Covert,* 354 U.S. 1 (1957), and its progeny. *Reid* dealt with the court-martial of a civilian spouse who had killed her military husband while stationed overseas, as authorized by a statutory provision in the UCMJ. After her conviction and direct appeals, she sought *habeas* relief on the grounds that the military had no *criminal* jurisdiction over her as a *civilian.* This Court agreed and its analysis began with a reassertion of the civilian-supremacy doctrine:

> The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. . . . The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. 354 U.S. at 23-24.

The Court went on to look at its own precedents:

> The *Milligan, Duncan* and *Toth* cases recognized and manifested the deeply rooted and ancient opposition in this country to the extension of military control over civilians. ***In each instance an effort to expand the jurisdiction of military courts to civilians was repulsed.*** 354 U.S. at 33.

Amici respectfully suggest that the situation herein is more egregious. Petitioner has detained and militarily imprisoned, *i.e.,* deprived Mr. Padilla of his liberty, without *any* charges simply by labeling him an "enemy combatant," and confining him virtually *incommunicado* in a military Brig.

Indeed, even the United States armed forces do not use the utterance "enemy combatant" to mean anything ***other than***

being synonymous to enemy soldier. [35] Nor did Congress in enacting the *Uniform Code of Military Justice,* 10 U.S.C. § 801 *et seq.,* use the phrase "enemy combatant." [36] Perhaps most damning to the Petitioner's assertion in this regard is that his own *Department of Defense Dictionary of Military and Associated Terms,*[37] *viz.,* Joint Publication 1-02, nowhere lists or defines the term "enemy combatant."

The wisdom of the *Reid* Court should be heeded: "We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly rooted in the Constitution." 354 U.S. at 40.

II. CONGRESS HAS CONSISTENTLY AND REPEATEDLY EXPRESSED ITS WILL THAT *CIVILIAN*-CITIZENS WILL NOT BE SUBJECT TO MILITARY AUTHORITY OR JURISDICTION.

Absent an express textual grant to the Executive, the will of Congress as Justice Jackson's concurring opinion in

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[35] *See, MCM,* Rule 916(c), *Rules for Courts-Martial,* "Discussion," which notes as to the defense of "justification," "killing an ***enemy combatant*** in battle is justified." [Emphasis added]. Nor is the term used in the 1949 Geneva Conventions or in other contemporary international law documents.

[36] In military jurisprudence, for the military to exercise "jurisdiction" over an individual, one must first possess military "status." *See, Solorio v. United States,* 483 U.S. 435 (1987). But, as *Solorio* held, that is a function textually committed to *Congress,* not the Commander-in-Chief pursuant to Article I, § 8, 483 U.S. at 440-41. But, even Congress cannot "militarize" the status of civilians for purposes of exercising military jurisdiction over them. *Cf., Reid v. Covert,* 354 U.S. 1 (1957), and *Kinsella v. Singleton,* 361 U.S. 234 (1960). Thus, the President can hardly claim such power.

[37] Available on-line at: http://www.dtic.mil/doctrine/jel/doddict/ [last accessed, April 6, 2004]. Quite simply, Petitioner has extracted an innocuous phrase from the *Quirin* opinion and now seeks to *ipse dixit* create a heretofore unknown "status" in domestic military law and the law of war.

Youngstown, supra, points out, is the primary barometer for assessing any Presidential "war powers." Thus, when the President is acting in a matter "incompatible with the express or implied will of Congress," [Jackson's category "3" scenario, 343 U.S. at 637-38], the President's power is "at its lowest ebb." The Judiciary can sustain such Executive power "only by disabling the Congress from acting upon the subject." *Id.* But, as here where Congress has affirmatively, clearly and expressly exercised its Article I, § 8, powers, Executive assertions to the contrary must be constitutionally rejected.

The seminal legislation is the *Posse Comitatus* Act, 18 U.S.C. § 1385 (1878).[38] This was an explicit prohibition against the use of the military against civilians, prompted by military abuses during Reconstruction. The Act, with two specified exceptions, *criminally* prohibits the use of the military to "execute the laws" of the United States. [39] Furthermore, to insure maximum compliance by our military, ***Petitioner's*** own regulations state in part that the *Posse Comitatus* Act "Prohibits search, seizure or arrest powers to US military personnel."[40]

There are two exceptions within the Act: those "authorized by the Constitution" [an express textual grant, *e.g.*, Art. I, § 8, cl. 15, U.S. Const., "calling forth the Militia to execute the laws...."], and those authorized by "Act of Congress." 18 U.S.C. § 1385. Congress has been far from silent legislatively in this regard: on one hand, *prohibiting* conduct that might run afoul of the Act, and conversely, passing

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[38]Other examples go back to the early days of the Republic. *Cf.*, the *Militia Acts* of 1792 and 1795, *supra,* and the scenario in *Little v. Barrame, supra.*

[39]While on its face the *Posse Comitatus* Act only applies to the Army and Air Force [Padilla being in a Navy Brig], the ***Petitioner*** by his own regulation applies this Act uniformly throughout the Armed Forces. *See,* DoD Directive 5525.5, *DoD Cooperation With Civilian Law Enforcement Officials* (January 15, 1986, as amended).

[40]*DoD Dictionary of Military and Associated Terms,* Joint Publication 1-02. *See* fn. 38, *supra.*

specific exceptions to the *Posse Comitatus* Act.[41]

A. "Prohibiting" Legislation.

Title 18, U.S.C. § 4001(a), states: "No citizen shall be imprisoned or ***otherwise detained*** by the United States except pursuant to an Act of Congress." [emphasis added]. Notably, the language does not read, "an Act of Congress ***or by Order of the President.***" Yet, that is the construct the Petitioner would have the Court adopt. *Amici* submit that § 4001(a) must be construed *in pari materia* with the *Pose Comitatus* Act, *supra.*[42] This is Petitioner's primary conceptual failure - Padilla, a U.S. citizen - cannot be "imprisoned or otherwise detained. . . ." by our military forces.

To clarify the *Posse Comitatus* Act, 10 U.S.C. § 375 was enacted. This mandates *inter alia* that Petitioner insure that any military "activity" (a broad parameter) "does not include or permit direct participation by a [military] member . . . in a search, seizure, arrest or other similar activity unless . . . otherwise authorized by law." There was and is *no* Congressional authorization for the U.S. military to *seize* and imprison Mr. Padilla in a military Brig, and thus Petitioner is in

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[41]As will be shown, Congress is both keenly aware of the Act and demonstrates regularly its willingness to legislate various exceptions. Their *failure* to do so post "9/11" is indicative of their *unwillingness* to grant the Commander in Chief the powers he claims herein. *See also,* House of Representatives, Committee on the Judiciary, Subcommittee on Crime, *Hearing on H.R. 3519* (amending *Posse Comitatus*)(June 13, 1981). William H. Taft IV, then DoD General Counsel (currently Legal Advisor to the Secretary of State) testified:

> "We oppose section 375, which would involve the armed forces directly in civilian law enforcement operations ***such as arrests and seizures.*** . . . The Department [of Defense] is committed to the fundamental separation between military and civilian activities. . . ." *Id.,* 15-16.

[42]Contrary to the contentions of Petitioner, it is not surprising that the DoD took no position on the enactment of § 4001(a). Petitioner's Brief at 47, fn. 20. The *Posse Comitatus* Act already barred them from such activity.

on-going violation of § 375.

B. Statutory Exemptions - the *Posse Comitatus* Act.

Petitioner cannot claim Congressional inactivity or abdication relative to the statutory exemptions envisioned by the Act. *Amici Curiae* will briefly address the major statutory exemptions to the *Posse Comitatus* Act in the context that Congress consistently uses quite specific language when it wants to exempt certain areas from the proscriptions of the Act, unlike the generalities of the *Authorization for Use of Military Force, supra.*

Title 10, U.S.C. § 332, part of the *Insurrection Act*, specifically ***allows*** the use of the military when events or "rebellion" "make it impracticable to enforce the laws. . . *by the ordinary course of judicial proceedings.* " [emphasis added]. This then codifies the *Milligan* "open court" component in the context of *martial law.*

Title 10, U.S.C. § 382, is a comprehensive and complex statutory exemption dealing with chemical or biological weapons in an "emergency situation,"which is specifically defined in the statute. This certainly demonstrates that Congress can and does limit military involvement with civilians to very precise parameters.

Title 18, U.S.C. §§ 351(g), 1116(d), and 1751(I), provide for the use of military forces when specified criminal acts (murder, assassination, etc.) are employed against high ranking officials. Again, both the crimes and the victims are narrowly drawn.

Title 18, U.S.C. § 831, is specific statute, allowing military law enforcement activity when there are "prohibited transactions involving nuclear materials." Section 831(e)(3)(A) specifically allows the military to "arrest . . . and conduct searches and seizures. . . ." under *limited* circumstances.

Title 32, U.S.C. § 112, expressly allows the use of the National Guard for "drug interdiction and counter-drug activities." Again, this is a specific exception to the Act.

C. Other Relevant Statutory Provisions.

When Congress in 1950, repealed the Articles of War and enacted the *Uniform Code of Military Justice,* it significantly limited the scope of who was to be subject to military law in Article 2(a), UCMJ.[43] But even that narrowly defined group proved to be constitutionally "over broad" in the context of including *civilians* who this Court subsequently found could *not be* subjected to military jurisdiction. *See, e.g., Toth v. Quarles, supra; Reid v. Covert, supra; Kinsella v. Singleton, supra,* and their progeny.[44]

Article 2(a)(9), UCMJ, 10 U.S.C. § 802(a)(9), provides the only *possible* basis for the military to acquire "jurisdiction"

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[43]10 U.S.C. § 802(a).

[44]The issues of the Commander in Chief's "war powers" in general and asserting *military* authority over civilians in particular, has vexed the Executive Branch for 200 years. *See, Little v. Barrame, supra* (1804) [illegal seizure of ship]; *Smith v. Shaw,* 12 Johns (22 NY Common L. Rptr) 257, 265 (NY, 1815) [false arrest by military during War of 1812: "If the defendant was justified in doing what he did, every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority."]; *Mitchell v. Harmony, supra* (1852) [illegal seizure of property by Army during Mexican War]; *In re McDonald,* 16 Fed.Cas. (# 8,751)(ED, Mo., 1861) [*habeas* action by civilian held in military Brig]; *Ex Parte Benedict,* 3 Fed.Cas. (# 1,292)(ND, NY, 1862) [*habeas* - civilian confined under "orders of the war department."]; *Ex Parte Field,* 9 Fed.Cas. 1 (#4,761)(D.Vt., 1862) [*habeas* - civilian confined "under some general order from the war department."];*Jones v. Seward,* 40 Barb. 563 (NY Sup. Ct., 1863) [false imprisonment by military: "the question to be determined being, whether the president of the United States . . . can arrest or imprison . . . any person not subject to military law . . ."]; *United States v. Russell, supra* (1872) [property confiscation by military during Civil War]; *Ex Parte Weitz,* 256 Fed. 58 (D. Mass. 1919) [*habeas* - civilian jailed by Army]; *United States v. Yasui,* 48 F.Supp. 40 (D. Ore. 1942), *aff'd* 320 U.S. 115 (1943) [Japanese internment case]; *Seery v. United States,* 127 F.Supp. 601 (Ct. Cl. 1955) [suit for damages and theft by U.S. Army in Austria]; and *Solorio v. United States, supra* (1987) [military jurisdiction textually committed to Congress].

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over the Respondent, *i.e.*, he is a "Prisoner of War."[45] Mr. Padilla is for sure a prisoner, but under both domestic and international law, he is *not* a Prisoner of War.[46]

As noted above, Congress has been careful to limit and define military law enforcement powers. Thus, Congress enacted Article 9, UCMJ,[47] which states in relevant parts:

> (a) ***Arrest*** is the restraint of a person by an order . . . ***Confinement*** is the physical restraint of a person.
>
> * * * * *
>
> (d) ***No person*** may be ordered into arrest or confinement except for probable cause. [emphasis added].[48]

Notably, Mr. Padilla in almost two *years* of confinement has never had any type of "probable cause" hearing. *Cf., County of Riverside, supra.* That is *no* process, much less *Due Process.*

Congress continued its limitations in Article 10, UCMJ, 10 U.S.C. § 810, by stating:

> **Restraint of persons charged with offenses:**
> . . . When any person ***subject to this chapter*** is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him. [emphasis added].

It is clear just from the section's title that "preventive detention," *viz.*, incarceration without any charges was *not* something that Congress envisioned for those *subject to*

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[45]If he is a *Prisoner of War,* then Respondent is entitled to the various protections provided by the 1949, Geneva Conventions and Protocols, *see, e.g.,The 1949 Geneva Convention Relative to the Treatment of Prisoners of War,* http://www.unhchr.ch/html/menu3/b/91.htm.

[46]Creating and applying the label "enemy combatant" to Mr. Padilla does not invoke any jurisdictional basis to militarily detain him.

[47]10 U.S.C. § 809.

[48]"No person" would seem to include Mr. Padilla.

military law. [49] But, if Mr. Padilla is subject to military detention but not charged, he must be released - unless there is a *sub silentio* imposition of martial law. Equally as fundamental is the clause, "any person subject to this chapter." That refers back to § 802(a), which does *not* encompass Mr. Padilla nor could it from a constitutional perspective.

D. The *Irrelevance* of 10 U.S.C. § 956(5).

Petitioner mistakenly seeks to apply 10 U.S.C. § 956(5) as authority for his claim that such explicitly and specifically constitutes Congressional "authorization" for Mr. Padilla's imprisonment.[50] Unfortunately, Petitioner misreads the statute. First, § 956 is part of Chapter 48, of Title 10, U.S. Code. Chapter 48 [§§ 951 *et seq.*] is entitled, "Military Correctional Facilities." Section 951(a) states in relevant (and controlling) part:

> The Secretaries concerned may provide for the establishment of such military correctional facilities as are necessary for the confinement of ***offenders against chapter 47 of this title*** [10 U.S.C. § 801 *et seq.*, the UCMJ].[51]

As noted above, Mr. Padilla is not charged with nor convicted of violating the UCMJ. Thus, his confinement in a military Brig is immediately suspect in light of the obvious Congressional intent.

Looking at 10 U.S.C. § 956 *in toto* (not taking § 956(5) out of context), that section is entitled: ***"Deserters, prisoners, members absent without leave: expenses and rewards."*** Its prefatory line reads, "Funds appropriated to the Department of Defense ***may be used*** for the following purposes:" thus

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[49]*Ergo,* why would Congress then supposedly authorize such for Padilla?

[50]Brief of Petitioner, at 39-40.

[51]This is an express Congressional statement authorizing confinement for "offenders" of the UCMJ - not "enemy combatants."

signifying that Congress did ***not*** have any specified "appropriation" in mind, otherwise they would not have used the discretionary "may be used" terminology.

Turning to subparagraph (5), it shows that there must be "regulations" prescribed,[52] yet those regulations offer no support for Petitioner. However, the correct reading of § 956(5) is this: "Funds appropriated to the Department of Defense *may be used* for . . . (5) . . .expenses ***incident to*** the maintenance, pay and allowances of" those persons denominated.[53] Simply put, the discretionary authorization to use funds *generally* appropriated for military correction facilities' *incidental* prisoner expenses, provides absolutely no support for Petitioner's contention that such a generalized appropriation authorization constitutes an *express* and controlling Congressional grant of authority to detain Mr. Padilla in a military Brig. Such a convoluted interpretation of a general

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[52]*See,* DoD Directive 1325.4, *Confinement of Military Prisoners and Administration of Military Correctional Facilities* (August 17, 2001). This is Petitioner's regulation and there is nothing remotely applicable to Mr. Padilla's "status" therein. However, it does reference DoD Directive 2310.1, *DoD Program for Enemy Prisoner of War (EPOW) and Other Detainees* (August 18, 1994). Again, this is Petitioner's *own* regulation and it begins by referencing the four 1949 Geneva Conventions. It goes on to provide DoD "policy" and paragraph 3.3 states in pertinent part:

> Captured or detained personnel shall be accorded an appropriate status under international law. Persons . . . detained may be transferred ***to*** . . . the care, custody, and control of the U.S. Military Services ***only*** . . . ***as authorized*** by the Geneva Conventions Relative to the Treatment of Prisoners of War and for the Protection of Civilian Persons in Time of War . . . ."

There is ***nothing*** in Petitioner's regulation about imprisoning "enemy combatants," nor do either of the referenced Geneva Conventions recognize that as an "appropriate status under international law."

[53]*Amici* would parenthetically note that persons "detained . . . pursuant to Presidential proclamation," [§ 956(5)], refers to persons incarcerated pursuant to the *Insurrection Act,* 10 U.S.C. §§ 331-35, and § 334 specifically refers to a Presidential proclamation to disburse *prior to* using the military to restore order.

spending authorization, especially in light of the other, significant restrictions Congress has placed upon the use of the military *vis-a-vis* civilians, is unwarranted and unsupported by the plain language of § 956. Congress in its wisdom, knows how and when to exempt the *Posse Comitatus* Act's restrictions and how to otherwise detain civilians. *United States v. Salerno,* 481 U.S. 739 (1987).[54]

CONCLUSIONS

Regardless of what the Commander in Chief may be directing our Armed Forces to do elsewhere in the world, the simple fact remains that martial law does not exist in the United States. Thus, both the Commander in Chief as well as his subordinates are subject to the provisions of the Constitution when it comes to Mr. Padilla's legal rights. The Judiciary has a time honored and constitutionally commanded role to play in adjudicating Respondent's rights. Just as King George III attempted to use his military to subvert civilian rule, so is the Petitioner overtly saying that the military judgment of the Commander in Chief - not the Constitution - suffices "to render the Military independent of and superior to the Civil Power." Our *Declaration of Independence* showed that to be an unacceptable concept then, and it must remain so today.

Regardless of what the Government suspects Mr. Padilla of doing or thinking of doing, the lessons of history command that we object to his illegal and *continued* military confinement herein, especially after two years without any Due Process.

Vast numbers of our citizenry have mobilized militarily to engage in combat in locations far from home. Lest we forget, each person in uniform has taken an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic. . . ." 10 U.S.C. § 502. Those in uniform

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[54]*Salerno* upheld the comprehensive provisions of the *Bail Reform Act,* 18 U.S.C. § 3141 *et seq.*, which authorized *pretrial* detention without bail after providing significant procedural due process protections. Mr. Padilla has not even been afforded those rights.

now and in times past who have paid the ultimate sacrifice, did so to "defend the Constitution of the United States." Doing that is the ultimate fight for "national security" and *Amici Curiae* respectfully urge this Court to recognize just what our veterans have fought, sacrificed and died for - the collective rights of liberty and justice for all.

Habeas Corpus respectfully should lie for Mr. Padilla.

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, Secretary of Defense,
Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN,
as next of friend of Jose Padilla,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF JANET RENO, *ET AL.*, AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici curiae are lawyers with many years of government service in law enforcement and intelligence. They submit this brief to help the Court understand the legal and practical framework within which the government has historically tracked, identified, and punished terrorists, and prevented terrorist attacks.[1]

SUMMARY OF ARGUMENT

The government asserts that the President has inherent power to imprison an American citizen indefinitely and without access to counsel or courts, based upon his essentially unreviewable determination that the citizen is an enemy combatant, even when the citizen is arrested within the United States and not on an active field of battle. The government claims that this power is essential to perform the Commander-in-Chief's function of protecting the Nation from attack, and that, as Judge Wesley put it in his dissenting opinion in the Court of Appeals, "[t]he President would [otherwise] be without any authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat *or* authorized the detention." *Padilla v. Rumsfeld*, 352 F.3d 695, 728 (2d Cir. 2003) (Wesley, J., dissenting in part). Amici submit that this fear is unfounded.

The government argues that two interests justify the assertion of presidential authority: preventing acts of terror

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[1] A list of the amici who are filing this brief is set forth in the Appendix. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the amici curiae or counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of this Court's rules, the parties have consented to the filing of this brief. Copies of the consents have been filed with the Clerk of the Court.

by enemy combatants and gathering intelligence about terrorist threats. Pet. Br. at 28-30. These are critical national interests. But suggesting that the sweeping power the President asserts here is necessary to accomplish them undervalues the arsenal of tools already at the government's disposal to fight terrorism. Our laws provide robust investigative techniques and ample detention and prosecution authority against citizen and non-citizen terrorists alike. In the last few years alone, the government has arrested and convicted numerous potential terrorists and many who have provided them aid. According to the Director of the Federal Bureau of Investigation, the government and its allies have thwarted over a hundred terrorist attacks.[2] To the extent that prosecutions have not been possible, or terrorist attacks such as the tragedy of September 11 have occurred, there is no indication that the sweeping power claimed here by the Executive would have made any difference.

Indeed, this very case demonstrates that the authority asserted by the government is unnecessary. Respondent Jose Padilla was immediately detained as a material witness upon entry into the United States. And in declaring Padilla an enemy combatant, the President relied upon facts that would have supported charging Padilla with a variety of offenses. The government thus had the authority to arrest, detain, interrogate, and prosecute Padilla apart from the extraordinary authority it claims here. The difference between invocation of the criminal process and the power claimed by the President here, however, is one of accountability. The criminal justice system requires that defendants and witnesses be afforded access to counsel, imposes judicial supervision over government action, and

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[2] *The War Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. 18 (2003) [hereinafter *War Against Terrorism Hearing*] (statement of FBI Director Robert S. Mueller).

places congressionally imposed limits on incarceration. The government in this proceeding claims the authority to imprison citizens without counsel, with at most extremely limited access to the courts, for an indefinite term.

Amici do not address the President's power to detain persons, including citizens, seized on an active field of combat. The exigencies of military action on the battlefield present an entirely different set of circumstances than the arrest of a citizen arriving at O'Hare International Airport. In this brief, however, we describe the ample authorities that exist – apart from the untrammeled power to detain citizens the President claims here – to investigate, apprehend, detain, and prosecute persons who may be planning terrorist acts against the United States.

ARGUMENT

I. THE GOVERNMENT HAS A VAST ARRAY OF TOOLS TO PROTECT THE UNITED STATES FROM TERRORIST ATTACK.

In the absence of specific congressional authorization, the danger that citizens of this country will commit acts of violence or conspire to do so has historically been dealt with as a law enforcement matter. Collectively, it is the experience of the amici curiae that the tools available now provide the Executive Branch with broad authority and flexibility to respond effectively to terrorist threats within our borders. Of course, no amount of government authority and resources can prevent every terrorist attack, any more than the government can prevent every robbery, murder, or fraud. But insofar as it can be said that terrorist atrocities, including the September 11 attacks themselves, resulted from any government "failures," they were not attributable to a lack of authority to detain American citizens indefinitely and incommunicado.

A. Existing Tools To Gather Intelligence About Terrorism

The primary tool for preventing terrorist attacks is the gathering of intelligence. Existing law provides the Executive Branch with a wide range of powers to uncover and monitor potential terrorist activities domestically, including physical surveillance, electronic surveillance, physical searches, subpoenas and other means of obtaining records.[3] Individuals may be detained and questioned pursuant to a variety of authorities – the criminal laws, the Immigration and Nationality Act, and the material witness statute, among others. And Congress, recognizing that investigations often require quick action, has provided emergency provisions to ensure that the Executive is not unduly hindered in its ability to respond quickly to emerging terrorist threats. Indeed, these tools for gathering intelligence are so productive that using them to conduct covert surveillance of potential terrorists may be a more effective long-run strategy than arrests and detention.[4]

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[3] The government can also conduct electronic surveillance and physical searches overseas, and can work cooperatively with foreign law enforcement and intelligence agencies. There are generally no constitutional restrictions on the use of investigative techniques against non-United States persons overseas. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990); *see United States v. Bin Laden*, 126 F. Supp. 2d 264, 276 (S.D.N.Y. 2000). Electronic surveillance and physical searches can be conducted against U.S. persons abroad to obtain foreign intelligence information, under certain restrictions imposed by the Executive Branch. Executive Order 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

[4] *See* Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism: Detention of Suspects Not Effective, They Say*, Wash. Post, Nov. 28, 2001, at A1.

1. *Physical Surveillance*

There are few constitutional restrictions on the government's ability to gather intelligence through physical surveillance (*i.e.*, the observation of people and activities). *See, e.g., Reporters Comm. for Freedom of the Press v. AT&T Co.*, 593 F.2d 1030, 1064 (D.C. Cir. 1978) ("When used in good faith, investigative techniques such as physical surveillance . . . violate no constitutional rights of the suspects involved."), *cert. denied*, 440 U.S. 949 (1979). A warrant is generally required only when the surveillance involves physical or technological intrusion into the target's home or other private area. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (surveillance of home with technology that is not in general public use requires warrant); *United States v. Torres*, 751 F.2d 875, 883 (7th Cir. 1984) (video surveillance inside target's business requires warrant), *cert. denied*, 470 U.S. 1087 (1985).

Accordingly, federal agents are permitted freely to conduct "[p]hysical or photographic surveillance of any person." U.S. Dep't of Justice, Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations § II(B)(6)(g), at 10 (May 30, 2002), http://www.usdoj.gov/olp/generalcrimes2.pdf. Also, "[f]or the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally." *Id.* § VI(A)(2), at 22. These Guidelines were recently amended to expand the FBI's authority to conduct investigations, eliminating "unnecessary procedural red tape" that could interfere with the prevention of terrorist activities. Attorney General John Ashcroft, Remarks on Attorney General

Guidelines (May 30, 2002), http://www.usdoj.gov/ag/speeches/2002/53002agpreparedremarks.htm.[5]

2. *Electronic Surveillance*

Within the United States, the government can intercept communications of potential terrorists pursuant to either Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*, or the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 *et seq.* These authorities were significantly expanded by the passage of the USA PATRIOT Act.[6] Under Title III, a federal court can issue an order authorizing surveillance upon a showing of probable cause to believe that an individual – not necessarily the target of the surveillance – has committed, or is about to commit, one of a large number of enumerated offenses, and that communications relating to that offense will be intercepted. 18 U.S.C. § 2518(3)(a), (b).[7] The potential predicates for electronic surveillance under Title III

5 The Justice Department also recently revised its guidelines governing the conduct of national security investigations, including terrorism investigations. These guidelines are classified and are available publicly only in heavily redacted form. U.S. Dep't of Justice, Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collections (Oct. 31, 2003), http://www.usdoj.gov/olp/nsiguidelines.pdf.

6 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001).

7 Title III also requires a showing that normal investigative procedures have been or are likely to be unsuccessful. 18 U.S.C. § 2518(1)(c). In practice, this showing has not proved difficult for the government. *See, e.g., United States v. Santana*, 342 F.3d 60, 65 (1st Cir. 2003) (government must show reasonable good faith effort to use normal investigatory methods but not that it exhausted all procedures), *cert. denied*, -- U.S. -- , 124 S. Ct. 1478 (2004); *United States v. McGuire*, 307 F.3d 1192, 1197-98 (9th Cir. 2002) (government has more latitude to wiretap when threat is grave).

include most terrorism-related offenses. *See id.* § 2516(1). Title III permits the interception of wire communications (such as telephone or cell phone calls), oral communications, and electronic communications (including e-mails, faxes, and pager transmissions). *Id.* § 2510(1), (2), (12). Orders can be issued for renewable 30-day periods. *Id.* § 2518(5).

Even when there is insufficient evidence to commence a criminal investigation, FISA provides the government with tools to investigate "international terrorism." 50 U.S.C. §§ 1801 *et seq.*[8] Electronic surveillance under FISA requires the government to obtain an order from a judge of the Foreign Intelligence Surveillance Court,[9] based upon a showing of probable cause to believe that the target of the surveillance is "a foreign power or agent of a foreign power" and is using the facilities or places where the surveillance will occur. *Id.* § 1805(a)(3)(A), (B). The definition of a foreign power includes "a group engaged in international terrorism or activities in preparation therefor." *Id.* § 1801(a)(4). An agent of a foreign power can include a U.S. citizen who "knowingly engages in . . . international terrorism, or activities that are in preparation therefor." *Id.* § 1801(b)(2)(C). FISA surveillance can be authorized for up to 90 days, 120 days, or one year, depending on the target, and can be renewed by the court. *Id.* § 1805(e). In 2002, the government obtained over 1,000 FISA orders targeting

8 "International terrorism" includes "violent [criminal] acts or acts dangerous to human life" intended to influence a nation or "intimidate or coerce" its population, either outside the United States or "transcend[ing] national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum." 50 U.S.C. § 1801(c).

9 The Foreign Intelligence Surveillance Court was created under FISA to consider applications for electronic surveillance in foreign intelligence investigations. 50 U.S.C. § 1803(a).

"terrorists, spies, and foreign powers who threaten our security." *War Against Terrorism Hearing*, *supra*, at 10 (statement of Attorney General John Ashcroft).[10]

To obtain a FISA warrant, the government must certify that "a significant purpose" of the surveillance is the collection of foreign intelligence information. 50 U.S.C. § 1804(a)(7)(B). This language, enacted as part of the USA PATRIOT Act, greatly enhanced the government's ability to use FISA to counter terrorist threats. Previously, some courts had permitted FISA surveillance only when intelligence collection was the government's "primary purpose." *See, e.g., United States v. Megahey*, 553 F. Supp. 1180, 1189-90 (E.D.N.Y. 1983), *aff'd sub nom. United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984). To ensure that this requirement was honored, and that FISA was not used in criminal investigations to bypass the stricter requirements of Title III, the Department of Justice established limits on the dissemination of FISA surveillance information to criminal investigators. *See In re Sealed Case*, 310 F.3d 717, 727-28 (For. Intel. Surv. Ct. Rev. 2002). The USA PATRIOT Act largely eliminated these limits, permitting a relatively free flow of information between intelligence and criminal investigators. *Id.* at 734-35.[11]

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[10] The government's annual FISA reports show that since its inception the Foreign Intelligence Surveillance Court has approved over 15,000 applications without modification, approved six applications with modifications, and declined to approve one application while granting leave to amend. *See* http://fas.org/irp/agency/doj/fisa/index.html.

[11] Similarly, the USA PATRIOT Act relaxed the requirements of grand jury secrecy and the confidentiality of intercepted communications, to permit criminal investigators to share relevant information with intelligence agents. USA PATRIOT Act § 203(a), 115 Stat. at 278-80 (permitting disclosure of grand jury materials when matters involve foreign intelligence or counterintelligence), *codified at* Fed. R. Crim. P. 6(e)(3)(D); USA PATRIOT Act § 203(b)(1), 115 Stat. at 280 (allowing

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Importantly, both Title III and FISA allow the government to conduct emergency surveillance without a court order if the need is so pressing that there is no time to obtain court approval. 50 U.S.C. § 1805(f) (allowing FISA surveillance for 72 hours before seeking court order); 18 U.S.C. § 2518(7) (allowing Title III surveillance for 48 hours before seeking a court order). According to FBI Director Robert S. Mueller, the government has made extensive use of these emergency provisions against terrorists.[12]

In addition to intercepting the contents of wire, oral, and electronic communications, the government can obtain a court order permitting the use of pen registers and trap and trace devices, merely by stating that the information is relevant to a criminal investigation or to protect against international terrorism. 18 U.S.C. § 3123(a); 50 U.S.C. § 1842(a), (c)(2). These devices allow investigators to record the receipt and transmission of electronic data such as dialed or received telephone numbers or e-mail and Internet usage. 18 U.S.C. § 3127(3)-(4). At a congressional hearing in 2002, a Department of Justice representative stated that the pen register and trap and trace authority "[a]bsolutely" had provided a successful tool in the fight against terrorism. *Tools Against Terror: Hearing Before the Tech., Terrorism & Gov't Info. Subcomm. of the Senate Comm. on the Judiciary*, 2002 WL 31272589, 107th Cong. (2002) (unpaginated) (statement of Deputy Assistant Attorney General Alice Fisher).

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government officials to disclose contents of intercepted communications if contents include foreign intelligence or counterintelligence), *codified at* 18 U.S.C. § 2517(6).

[12] *War Against Terrorism Hearing*, *supra*, at 16 (statement of FBI Director Mueller).

3. *Physical Searches*

The government's authority to obtain warrants to search for and seize evidence of a crime, based on probable cause, is well established. U.S. Const. amend. IV; *Illinois v. Gates*, 462 U.S. 213, 243-46 (1983); Fed. R. Crim. P. 41. Probable cause is a "practical, nontechnical conception that deals with the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act." *Maryland v. Pringle*, -- U.S. -- , 124 S. Ct. 795, 799 (2003) (internal quotations omitted). It is not "comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Moreover, the government need not show probable cause to conduct searches at the border. *See United States v. Flores-Montano*, -- U.S. -- , 124 S. Ct. 1582, 1585-86 (2004).

In the case of international terrorism, the government can also obtain search warrants under FISA. FISA search warrants do not require a showing of probable cause to believe that a crime has been or will be committed. Rather, the government need only establish probable cause to believe that the target of the search is a foreign power or an agent of a foreign power and that the premises or property to be searched is owned, possessed, or used by a foreign power or an agent of a foreign power, and certify that a significant purpose of the search is to obtain foreign intelligence information. 50 U.S.C. §§ 1823(a)(7)(B), 1824(a)(3). FISA physical search warrants can authorize multiple searches over a period of time. *Id.* § 1824(c)(1)(D). FISA also contains emergency provisions, one of which allows the government to search the residence of a suspected terrorist for up to 72 hours before seeking court authorization if notice is provided immediately to the court. *Id.* § 1824(e)(1).

To protect national security and avoid alerting the targets, the government can execute a FISA search warrant in secret. *See* 50 U.S.C. § 1824(a) (authorizing *ex parte* order approving FISA physical search); *id.* § 1822(4)(A)(i) (court may order landlord or custodian to furnish assistance "necessary to accomplish the physical search in such a manner as will protect its secrecy"). Indeed, even in the case of traditional criminal searches, the USA PATRIOT Act permits a court to delay notifying a target of the search to protect an investigation. USA PATRIOT Act § 213, 115 Stat. at 286, *codified at* 18 U.S.C. § 3103a(b).

4. *Obtaining Records*

In addition to these extensive investigative powers, the government has far-reaching powers to obtain records and evidence. It may use the grand jury process to issue subpoenas and ferret out information about possible terrorist threats. There is no probable cause requirement for a grand jury subpoena; as this Court has recognized, the facts that might lead to a finding of probable cause, such as the "'identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.'" *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991). (quoting *Blair v. United States*, 250 U.S. 273, 282 (1919)). Thus, the scope of relevancy to a grand jury's inquiry is extraordinarily broad. *Id.* at 301 (records subpoenaed by a grand jury must be produced unless there is "no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation").

Similar broad power exists in investigations of international terrorism. FISA permits the FBI to obtain from the Foreign Intelligence Surveillance Court an order for the production of "any tangible things (including books, records,

papers, documents, and other items)" by certifying that the records are sought as part of an investigation to protect against international terrorism. 50 U.S.C. § 1861(a)(1), (b)(2).[13] The order must be entered *ex parte* and without disclosing the purpose of the investigation. *Id.* § 1861(c). Disclosure of the order, even by the recipient, is prohibited. *Id.* § 1861(d).

Indeed, in terrorism investigations the government can obtain certain types of records even without a court order by the use of so-called "national security letters." For example, 12 U.S.C. § 3414 grants the FBI the right to obtain financial records by certifying that they are sought for "foreign counter intelligence purposes to protect against international terrorism or clandestine intelligence activities." *Id.* § 3414(a)(1)(A)-(C), (a)(5)(A).[14] As under FISA, a government request under this provision may not be disclosed. *Id.* § 3414(a)(3), (a)(5)(D). National security letters can also be used to obtain credit records and transactional records of wire and electronic communications. 15 U.S.C. § 1681u; 18 U.S.C. § 2709(a).

5. *Interrogation*

The government has the ability to obtain information by questioning persons who may be associated with, or have information about, terrorists. There is, of course, no

[13] Section 215 of the USA PATRIOT Act expanded this power. 115 Stat. at 287. Previously, the FBI could only seek business records from a limited class of entities and the target had to be a "foreign power or an agent of a foreign power." 50 U.S.C. § 1862(a), (b)(2)(B) (2000).

[14] Recent legislation greatly broadened the range of "financial institutions" from which records may be obtained by national security letter to include currency exchanges, travel agencies, pawnbrokers, casinos, and the U.S. Postal Service. *See* Intelligence Authorization Act for Fiscal Year 2004 § 374(a), Pub. L. 108-177, 117 Stat. 2599, 2628 (2003), *codified at* 12 U.S.C. § 3414(d).

restriction on the government's ability to question persons in a non-coercive setting; agents are free to ask any question of any person, who is free to decline to answer or simply to walk away. *See, e.g., Florida v. Royer*, 460 U.S. 491, 497-98 (1983). If the agent has a reasonable suspicion of criminal activity, he or she may briefly detain the person for questioning. *Terry v. Ohio*, 392 U.S. 1 (1968). Persons who have been taken into custody can be questioned after they have been given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) and, if they request counsel, in the presence of counsel.

The government has argued that these requirements will impair its ability to obtain information from enemy combatants, and that it requires indefinite, uncounselled detention for effective interrogation of terrorists. *See Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 49-53 (S.D.N.Y. 2003). It may be true that in some cases the government will not be able to obtain information from citizens who are informed of their right to counsel, or that obtaining that information may be delayed – although as the District Court noted in this case, that conclusion itself is speculative. *Id.* at 51-53.[15] In fact, many terrorists who have been arrested and provided counsel have decided to cooperate and provide valuable information to the government. *See infra* pp. 22-24. Others might not cooperate even if detained indefinitely and without counsel. But more importantly, as a Nation we have chosen to place some limits on Executive authority in order to protect individual authority.

[15] In a study of interrogation of criminal suspects, over three-quarters of the suspects waived their *Miranda* rights, and almost two-thirds provided incriminating information after being warned. Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 276 tbl. 3, 280-81 tbl. 7 (1996).

B. Existing Tools to Apprehend Terrorists

When investigative tools produce information that an individual is involved with terrorism, the government has a variety of authorities under which it can arrest, detain, and question that person. Most obviously, a person can be arrested if there is probable cause to believe that he or she has committed a crime, *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *United States v. Watson*, 423 U.S. 411, 415-23 (1976), and can be held in custody after arrest.[16] Many federal statutes can be used to arrest and prosecute persons who actually commit terrorist acts.[17]

Of course, preventing a terrorist act from occurring is far more desirable than apprehending and punishing someone who has already completed an attack. In recent years, Congress has passed a number of statutes expanding and supplementing the government's authority to prosecute terrorists before they strike. These include a prohibition on

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[16] An arrested individual must be taken before a court "without undue delay," Fed. R. Crim. P. 5(a), and can be detained if no bail conditions would "reasonably assure . . . the safety of any other person and the community," 18 U.S.C. § 3142(e). Suspects believed to be involved with terrorism are likely to be detained as flight risks or dangers to the community even if they are not charged with terrorism offenses.

[17] *See, e.g.*, 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities); *id.* § 844 (manufacture and handling of explosive materials); *id.* § 924(c)(1)(A)(iii) (possession of firearms in furtherance of crimes of violence); *id.* § 1111 (murder committed while conducting espionage or sabotage); *id.* § 1113 (attempt to commit murder or manslaughter within special maritime or territorial jurisdiction); *id.* § 1114 (murder of federal officer or employee); *id.* § 1117 (conspiracy to murder a U.S. person, U.S. officer, or foreign official); *id.* § 2332 (attempted homicide of U.S. national outside the U.S.); *id.* § 2332a(a)(1) (use of certain weapons of mass destruction); *id.* § 2332b (acts of terrorism transcending national boundaries); *id.* § 2381 (treason); *id.* § 2384 (seditious conspiracy); 49 U.S.C. § 46502 (aircraft piracy); *id.* § 46504 (interference with flight crew members and attendants).

providing "material support or resources," or concealing material support or resources, knowing or intending that they are for use in preparing for or carrying out a terrorist offense, 18 U.S.C. § 2339A; a prohibition on providing "material support or resources" to any terrorist organization designated by the Secretary of State, *id.* § 2339B;[18] and a prohibition on providing or collecting funds intending that they will be used to carry out a terrorist act, *id.* § 2339C. These statutes give the government considerable authority to prosecute individuals who are associated with terrorism, long before any terrorist act has been committed. For example, "material support" for terrorism includes not only weapons and personnel, but also training, safehouses, lodging, false documentation, communications equipment, financial services, and currency. *Id.* § 2339A(b).[19]

The government has also relied on the International Emergency Economic Powers Act (IEEPA)[20] to promulgate far-reaching regulations to disrupt the funding of terrorist activity. *See, e.g.*, Continuation of Emergency With Respect

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[18] As of March 2004, the Secretary of State had identified 37 groups as foreign terrorist organizations, including al Qaeda. *See* Press Release, Dep't of State, Redesignation of Foreign Terrorist Organizations (Mar. 22, 2004), http://www.state.gov/r/pa/prs/ps/2004/30649.htm.

[19] The Court of Appeals for the Ninth Circuit has held that section 2339B's prohibition of material support in the form of "personnel" and "training" is unconstitutionally vague and it required that the defendant have knowledge that the organization was a terrorist group. *Humanitarian Law Project v. Dep't of Justice*, 352 F.3d 382, 393-94, 403-04 (9th Cir. 2003). *But see United States v. Al-Arian*, No. 8:03-CR-77-T-30TBM, 2004 WL 516571, at *9-10 (M.D. Fla. Mar. 12, 2004) (finding it unnecessary to hold Section 2339B unconstitutionally vague and instead implying *mens rea* requirement).

[20] 50 U.S.C. § 1701(a) (providing the President with broad authority "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States if the President declares a national emergency with respect to such threat").

to the Taliban, 66 Fed. Reg. 35,363 (Jun. 30, 2001). Under IEEPA regulations, "no U.S. person may deal in property or interests in property of a specially designated terrorist, including the making or receiving of any contribution of funds, goods, or services to or for the benefit of a specially designated terrorist." 31 C.F.R. § 595.204 (2003).[21] Violations of the IEEPA regulations are felonies. 50 U.S.C. § 1705(b). The government can also freeze accounts or seize property belonging to terrorist organizations when these items come within the United States or within the possession of a United States citizen. 31 C.F.R. § 595.201.

U.S. citizens associating themselves with terrorist groups will often be subject to prosecution under other statutes as well. The seditious conspiracy statute prohibits plotting to overthrow the United States, to levy war against the Nation, or unlawfully to seize or possess any government property. 18 U.S.C. § 2384. Another statute forbids enlisting within the United States "with intent to serve in armed hostility against the United States." *Id.* § 2390. The Neutrality Act of 1794 prohibits various acts of war against entities with whom the United States is at peace. *Id.* §§ 958-962. The reach of these statutes is not limited to traditional conflicts between nations, but extends to terrorist activities.[22]

Finally, statutes of more general applicability can also be used to reach inchoate terrorist activity. *See, e.g.*, 18 U.S.C. § 371 (conspiracy to violate federal law); *id.* § 2332a(a)(1) (attempted use of a weapon of mass

[21] *See United States v. Lindh*, 212 F. Supp. 2d 541, 560-64 (E.D. Va. 2002) (upholding IEEPA regulations in prosecution of American who fought alongside the Taliban in Afghanistan).

[22] *See, e.g. United States v. Rahman*, 189 F.3d 88, 123 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000) (seditious conspiracy); *United States v. Khan*, No. CRIM.03-296-A, 2004 WL 406338, at *23 (E.D. Va. Mar. 4, 2004) (Neutrality Act, 18 U.S.C. § 2390).

destruction).[23] A conspiracy charge does not require that a defendant actually carry out the goals of the conspiracy. Rather, the government must prove only an agreement to achieve an unlawful objective, a defendant's knowing and voluntary participation in that agreement, and the commission of an overt act (not necessarily by the defendant) that furthers the conspiracy. *United States v. Bayer*, 331 U.S. 532, 542 (1947). Similarly, establishing that a defendant attempted a crime requires only proof that he or she has "taken a substantial step towards that crime" and "had the requisite mens rea." *Braxton v. United States*, 500 U.S. 344, 348 (1991). In short, the government need not await the actual commission of a terrorist act to arrest, prosecute, and convict a would-be terrorist.

Even when there is insufficient evidence to charge a citizen with a crime, the material witness statute, 18 U.S.C. § 3144, permits the detention of a person whose testimony is "material in a criminal proceeding" if "it may become impracticable to secure the presence of the person by subpoena." This statute is an effective counter-terrorism tool for several reasons. Because a grand jury investigation is a "criminal proceeding" for purposes of this statute, *see United States v. Awadallah*, 349 F.3d 42, 49-64 (2d Cir. 2003); *Bacon v. United States*, 449 F.2d 933, 939-41 (9th Cir. 1971), and because of the broad scope of grand jury investigations, *see supra* p. 11, the government can detain a suspected

[23] Numerous specific conspiracy provisions could also apply to terrorist activity. *See, e.g.*, 18 U.S.C. § 37 (conspiracy to commit violence at international airport); *id.* § 175(a) (to collect or use biological weapons); *id.* § 229(a)(2) (to collect or use chemical weapons); *id.* § 372 (to injure any officer of the United States); *id.* § 1203(a) (to take hostages); *id.* § 2332a (to use a weapon of mass destruction); *id.* § 2332b(a)(2) (to terrorize across international boundaries), *id.* § 2384 (seditious conspiracy).

terrorist as a material witness before it has evidence sufficient to support a criminal arrest or indictment.[24]

The government can obtain a material witness warrant with relative ease. For a grand jury witness, the required showing can be made by a good faith statement by a prosecutor or investigating agent that the witness has information material to the grand jury. *Bacon*, 449 F.2d at 943; *Awadallah*, 349 F.3d at 65-66. Nor would establishing that a suspected terrorist poses a flight risk be an onerous task. *See* 349 F.3d at 69 (bail denied in part because witness failed to come forward with material testimony concerning terrorist attack).

Finally, the material witness statute can help prevent terrorist acts by incapacitating terrorists. A material witness may only be detained until his or her testimony has been secured. *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413, 419-20 (5th Cir. 1992). However, if further investigation reveals evidence that the witness was actually part of a terrorist conspiracy or has committed perjury before the grand jury, he or she may be re-arrested as a criminal suspect, without the necessity of release. *See Awadallah*, 349 F.3d at 47, 63, 70; *In re Material Witness Warrant (Doe)*, 213 F. Supp. 2d 287, 303 (S.D.N.Y. 2002) (citing *United States v. Regan*, 103

[24] Following the September 11 attacks, the government detained a number of individuals as material witnesses to its investigation, half of whom were held for 30 days or more. Letter from Jamie E. Brown, Acting Ass't Attorney General, Office of Legislative Affairs, to Rep. F. James Sensenbrenner, Jr., Chairman, House Judiciary Committee, at 50 (May 13, 2003), http://www.house.gov/judiciary/patriotlet051303.pdf. *See also Padilla*, 352 F.3d at 699-700; *Awadallah*, 349 F.3d at 47; *In re Material Witness Warrant (Doe)*, 213 F. Supp. 2d 287, 288 (S.D.N.Y. 2002).

F.3d 1072, 1079 (2d Cir. 1997)).[25] The suspected terrorist will thus remain unable to perpetrate any attacks.[26]

C. Existing Tools to Protect Classified Information

Prosecution of terrorists often requires balancing the defendant's constitutional rights and the government's legitimate interests in protecting national security. Federal law amply recognizes these national security interests and protects them in a variety of contexts. Federal grand jury proceedings, and proceedings ancillary to the grand jury, are secret. Fed. R. Crim. P. 6(e); *see In re Newark Morning Ledger*, 260 F.3d 217, 226 (3d Cir. 2001) ("The secrecy afforded to grand jury materials under Fed. R. Crim. P. 6(e) extends beyond the actual grand jury proceeding to collateral matters, including contempt proceedings, which relate to grand jury proceedings and may potentially reveal grand jury information.") (citations omitted). For example, in the present case the material witness warrant for Padilla's arrest, and the affidavit submitted by the government in support of that warrant, remain sealed. More generally, the government

[25] For example, Terry Nichols, one of the perpetrators of the Oklahoma City bombing, was initially arrested and detained as a material witness, and was not actually charged with the crime for 18 days. *In re Material Witness Warrant*, 77 F.3d 1277, 1278-79 (10th Cir. 1996).

[26] In the case of non-citizens, the Immigration and Nationality Act provides additional authority to detain potential terrorists. Any alien seeking to enter the country who has engaged in terrorist activity, or who the government has reasonable ground to believe is likely to engage in terrorist activity, is inadmissible for national security reasons. 8 U.S.C. § 1182(a)(3)(B). Similarly, an alien who is lawfully in the country who engages in terrorist activity is deportable. *Id.* § 1227(a)(4)(A)-(B). "Engaging in terrorist activity" is broadly defined to include not only carrying out terrorist acts, but also planning or preparing for such acts, or membership in or material support for a terrorist organization. *Id.* § 1182(a)(3)(B)(iv). Any alien who the Attorney General certifies is deportable or inadmissible for national security reasons must be detained until removed. *Id.* § 1226a.

is permitted to withhold the identity of informants in many circumstances. *See, e.g., Roviaro v. United States*, 353 U.S. 53, 59-61 (1957). And, as happened in this case, courts will frequently permit the government to file papers under seal if disclosure of the information in those papers could harm national security. *See, e.g., United States v. Ressam*, 221 F. Supp. 2d 1252, 1264 (W.D. Wash. 2002) (denying press requests to unseal classified documents filed under seal).

The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, gives courts additional ability to protect classified materials during criminal prosecutions.[27] CIPA permits the court to authorize the government to delete classified information from any materials disclosed to the defendant, to substitute a summary of such classified documents, or to substitute admissions regarding the relevant facts that the classified information would tend to prove. *Id.* § 4. A defendant must notify the government and the court in writing before disclosing classified information. *Id.* § 5(a).

Before any classified information may be used at trial or pretrial, the government can request a hearing to determine its relevance and admissibility. *Id.* § 6(a). This hearing may be held *ex parte* and *in camera*. *See, e.g., United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998). If the court determines that the evidence is admissible, the government must then find an alternative method of getting the information to the jury that is less harmful to national

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[27] CIPA's constitutionality has been upheld. *See, e.g., United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (rejecting Fifth and Sixth Amendment challenges); *United States v. Lee*, 90 F. Supp. 2d 1324, 1326-29 (D.N.M. 2000) (same); *United States v. Poindexter*, 725 F. Supp. 13, 33-35 (D.D.C. 1989) (same). *But cf. Crawford v. Washington*, -- U.S. -- , 124 S. Ct. 1354 (2004) (holding that Confrontation Clause generally prevents use of testimonial statements by prosecution when defendant lacks opportunity to cross-examine witness).

security, such as providing an unclassified summary of the relevant information or admitting certain facts. 18 U.S.C. App. III, § 6(c); *United States v. Noriega*, 117 F.3d 1206, 1215 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998). Ultimately, however, if no adequate substitute can be found, the court has the authority to strike certain counts, preclude certain evidence, make findings against the government, or even dismiss the case, if it is necessary in the interest of justice. 18 U.S.C. App. III, § 6(e)(2). A recent examination of the use of CIPA showed that charges are rarely dismissed.[28]

II. THE SWEEPING POWER THE PRESIDENT CLAIMS IS UNWARRANTED.

These authorities, broad and powerful on paper, have been effective in practice. Over the last decade, the investigative, detention, and prosecutive authorities discussed above have been used in many cases not only to identify, arrest, and punish persons who have committed terrorist acts,[29] but to disrupt and thwart terrorism before it can occur. A year ago Attorney General Ashcroft identified 211 terrorism-related criminal charges that had been brought to that date, with 108 convictions or guilty pleas. *War Against Terrorism Hearing*, *supra*, at 10 (statement of Attorney

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[28] Committee on Communications and Media Law, *The Press and The Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 57 The Record 94, 161 n.263 (2002) (authors found only one case in which a court dismissed charges pursuant to § 6(e)).

[29] *See, e.g., United States v. Yousef*, 327 F.3d 56 (2d Cir.), *cert. denied*, -- U.S. -- , 124 S. Ct. 353 (2003) (affirming convictions of defendants involved in 1993 World Trade Center bombing and conspiracy to hijack airliners); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998), *cert. denied*, 526 U.S. 1028 (1999) (affirming convictions of defendants involved in 1993 World Trade Center bombing); *Kasi v. Virginia*, 508 S.E.2d 57 (Va. 1998), *cert. denied*, 527 U.S. 1038 (1999) (affirming conviction of defendant who murdered CIA employees).

General Ashcroft). A listing of some of these cases illustrates the effectiveness of the investigative tools we have described to stop terrorists before they carry out their plans:

- Sheikh Omar Abdel Rahman and his followers were convicted of plotting a "day of terror" against New York City landmarks, including the United Nations building, the Lincoln and Holland Tunnels and the George Washington Bridge. The government used traditional investigatory powers, including physical surveillance, search warrants, and informants, to track the activities of this group, and arrested them when they had begun building an explosive device. *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999).

- Ahmed Ressam, the so-called "Millennium Bomber," was arrested in December 1999 as he attempted to enter the United States in a rental car containing homemade explosives and timers. Ressam eventually pleaded guilty and cooperated extensively with the government in its prosecution of others involved in the planned attacks. He also provided more general information about al Qaeda and its training camps in Afghanistan and identified potential terrorists.[30]

- Iyman Faris pleaded guilty to providing material support for terrorism. Faris visited an al Qaeda training camp in Afghanistan and investigated the destruction of bridges in the United States by severing their suspension cables. The government developed evidence through physical and electronic surveillance

[30] *See* Michael Powell & Christine Haughney, *Los Angeles Airport Intended Target, Terrorism Plot Defendant Tells Jury*, Wash. Post, July 4, 2001, at A2; *see also* Ann Davis, *Surprising Number of Bin Laden Followers are Helping U.S. Investigators*, Wall St. J., Dec. 21, 2001, at B1.

and a search of his residence. After his arrest Faris cooperated with investigators.[31]

- Several members of a terrorist cell in Portland, Oregon, were indicted on conspiracy, material support, and firearms charges. One of the defendants pleaded guilty and testified against the others, leading to guilty pleas from them. Six of the men had attempted to travel to Afghanistan to assist the Taliban. The government used electronic surveillance and the authorities of the USA PATRIOT Act to develop evidence in the case.[32]

- Six residents of New York State pleaded guilty to charges arising from their travel to Afghanistan and attendance at al Qaeda training camps. The evidence against them was developed from electronic surveillance. They agreed to cooperate with government investigations of terrorist activities.[33]

[31] *See* Jerry Markon, *Ohio Man Gets 20 Years for Al Qaeda Plot*, Wash. Post, Oct. 29, 2003, at A2; *FBI Questioned Faris After Sept. 11 Attacks*, Houston Chron., June 21, 2003, at 10; Ted Wendling, *Ohio Agents Tailed Terrorist for More Than a Year*, Plain Dealer, June 21, 2003, at A1; *see also* Press Release, Dep't of Justice, Iyman Faris Sentenced for Providing Material Support to Al Qaeda (Oct. 28, 2003), http://www.usdoj.gov/opa/pr/ 2003/October/03_crm_589.htm.

[32] *See* Lynn Marshall & Tomas Tizon, *Three Members of Terrorist Cell Sentenced; One of the 'Portland Seven' Expresses Sorrow for Trying to Join the Taliban After 9/11*, L.A. Times, Feb. 10, 2004, at A12; Blaine Harden & Dan Eggen, *Duo Pleads Guilty to Conspiracy Against U.S.*, Wash. Post, Oct. 17, 2003, at A3; *see also* Press Release, Dep't of Justice, Two Defendants in 'Portland Cell' Case Plead Guilty to Conspiracy to Contribute Services to the Taliban, Federal Weapons Charges (Sept. 18, 2003), http://www.usdoj.gov/opa/pr/2003/September/03_crm_513.htm.

[33] *See* John Kifner & Marc Santora, *Feds Say One in N.Y. Cell Arranged Training*, Pitts. Post-Gazette, Sept. 18, 2002, at A6; Tamer El-Ghobashy & Greg Smith, *E-Mail Led to Cell Bust*, N.Y. Daily News, Sept. 17, 2002, at 8; *see also* Press Release, Dep't of Justice, Mukhtar Al-

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- Earnest James Ujaama pleaded guilty to providing material support to terrorism related to his involvement in a 1999 plan to build a terrorist training camp in Oregon. After pleading guilty, Ujaama cooperated with the government, serving as a key witness in a grand jury investigation of an alleged top al Qaeda recruiter.[34]

- Sami Al-Arian, a university professor, and seven others were indicted for conspiring to finance terrorist attacks. The evidence against Al-Arian was derived from extensive FISA wiretaps, which could be used in the criminal case because of the new procedures enacted by the USA PATRIOT Act.[35]

As this discussion demonstrates, there is both a robust legal framework to combat terrorism and a demonstrated history of successful use of those authorities without resort to the extraordinary power claimed here by the President. Contrary to the fears expressed by Judge Wesley in his dissenting opinion, the President has ample "authority to detain a terrorist citizen dangerously close to a violent or destructive act on United States soil." *Padilla*, 352 F.3d at 728 (Wesley, J., dissenting in part). Indeed, there is no indication that any of these cases depended in any way upon such a detention.

Footnote continued from previous page
Bakri Pleads Guilty to Providing Material Support to Al Qaeda (May 19, 2003), http://www.usdoj.gov/opa/pr/2003/May/03_crm_307.htm.

[34] *See Witness Said Ready to Testify on Al Qaeda Suspect*, Wash. Post, June 2, 2003, at A2.

[35] *See* Jerry Seper, *Islamic Jihad Suspect Seeks to Represent Himself*, Wash. Times, May 27, 2003, at A1; Michael Fletcher, *Terror Traced to Tampa*, Tampa Trib., Feb. 21,. 2003, at 1; Jess Bravin & Glenn R. Simpson, *Confronting Iraq and Terror: Florida Professor, 7 Others Are Accused of Terror Funding*, Wall St. J., Feb. 21, 2003, at A8.

The record in the instant case demonstrates that these authorities were available, and to some extent were actually used, to deal with Padilla himself. Padilla was arrested on May 8, 2002, pursuant to a material witness warrant. *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). The court issued the warrant based upon an affidavit from an FBI agent averring that Padilla possessed knowledge of facts relevant to a grand jury investigation of the September 11 attacks. *Id.* at 571. The affidavit was sealed by the District Court and remains under seal. Padilla was transported to New York, where he was detained and counsel was appointed to represent him. *Padilla*, 352 F.3d at 700. The government subsequently asked the court to vacate the material witness warrant and transferred Padilla to the custody of the Department of Defense based upon the President's determination that Padilla was an enemy combatant. *Id.* For almost two years thereafter, until his case came before this Court, Padilla was held incommunicado, without access to his lawyer. *See id.*

When Padilla was arrested pursuant to the material witness warrant, his terrorist plans were thwarted. He was then available to be questioned to the same extent as any other citizen suspected of criminal activity. Moreover, the facts set forth in the President's findings, and the facts presented to the District Court, are more than sufficient to support criminal charges against Padilla, including providing material support to designated terrorist organizations, 18 U.S.C. § 2339B; providing material support to terrorists, *id.* § 2339A; conspiracy to use a weapon of mass destruction, 18 U.S.C. § 2332a; and attempted use of a weapon of mass destruction, *id.* § 2332a(a)(1).[36] Finally, Padilla's history of

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[36] The government claims that Padilla traveled to Afghanistan, approached a senior officer of al Qaeda, proposed stealing radioactive material to build a "dirty bomb" and detonate it in the United States, researched such a project at an al Qaeda safe house in Pakistan, had

Footnote continued on next page

travel outside the United States, previous criminal record, and terrorism-related activities clearly justified detaining him. 18 U.S.C. § 3142(e). In short, the procedures of the criminal law provided an ample basis to detain Padilla, to subject him to interrogation, and to keep him from carrying out any violent acts against the United States or any of its citizens. It is difficult to imagine any circumstances in which a terrorist would meet the standards for designation as an enemy combatant described by the government, *see* Pet. Br. at 27, and not be subject to arrest as a material witness or a criminal.

The difference between what the government did in this case, and what existing law authorizes it to do, is one of accountability and transparency. The government could have continued to detain Padilla, but would have been required to justify the detention to a court in an adversary proceeding, based on the traditional probable cause standard. The government could have questioned Padilla, but would have had to secure the consent of his lawyer to do so. The government could have convicted and imprisoned him, but would have had to do so after a trial in District Court. By denying him these protections, the Executive Branch is claiming a virtually unlimited right to arrest citizens within the United States based solely upon the President's determination that they are enemy combatants, and to imprison them incommunicado for an indefinite period of time without counsel and without meaningful judicial review.

This untrammeled power stands in stark contrast to the legal framework described above. Indeed, none of the

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"extended contacts" with al Qaeda, received training in furtherance of terrorist activities from al Qaeda, and was sent to the United States to conduct reconnaissance or terrorist attacks on behalf of al Qaeda. *Padilla*, 233 F. Supp. 2d at 572-73.

governmental powers described in this brief permits any substantial deprivation of a citizen's liberty or invasion of his or her privacy without congressional authorization and judicial oversight. To pick just one example, electronic surveillance under either Title III or FISA is authorized by statute; requires a court order based on a factual showing under oath; is limited in time and scope; and is subject to subsequent judicial review in court proceedings. *See supra* pp. 6-9. Even in emergency situations, electronic surveillance is permitted without judicial supervision for only a brief period of time. Similarly, the arrest and detention of citizens within the United States pursuant to the criminal law or the material witness statute normally requires a judicial warrant and carries the right of subsequent judicial review with the assistance of counsel; while law enforcement officials may arrest individuals without a warrant, they must timely demonstrate to a court that they had probable cause to do so. *Gerstein v. Pugh*, 420 U.S. 103 (1975); Fed. R. Crim. P. 5; *Awadallah*, 349 F.3d at 59-62 (summarizing numerous procedural safeguards afforded to material witnesses).

The broad and largely unsupervised authority claimed by the Executive Branch is also inconsistent with the fundamental principles of our Constitution. Arbitrary arrest and imprisonment by the King was one of the principal evils that the Constitution and the Bill of Rights were meant to address. *See Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946). These principles have been adhered to even when national security is implicated. For example, this Court rejected the claim that the Executive had inherent authority to detain an alleged Confederate sympathizer outside the field of battle where courts were functioning. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) It questioned the Executive's authority to conduct electronic surveillance in the interest of national security, at least when foreign powers are not involved. *United States v. United States District Court*, 407 U.S. 297 (1972). And it rejected a claim that the Executive

had authority to seize steel mills in wartime. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). The power which the Executive seeks in this case is far broader and far more terrifying.[37]

Congress has recognized the danger inherent in Executive power to detain citizens and has provided that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). This statute could not be a clearer congressional rejection of the inherent Executive authority claimed here.[38] The government contends, however, that the Joint Resolution passed by Congress on September 18, 2001, sufficiently authorizes the actions it took here to satisfy section 4001(a). Pet. Br. at 38-44. But that Resolution merely grants broad and generic authority to use military force against the nations, organizations and persons that the President determines were involved in the September 11 attacks. Pet. App. 59a-60a. As the Court of Appeals held, there is "no reason to suspect" that Congress, in granting authority to use military force, "believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not 'arrayed against our troops' in the field of battle." *Padilla*, 352 F.3d at 723 (quoting *Hamdi v. Rumsfeld*, 316 F.3d 450, 467 (4th Cir. 2003)). A clearer statement of congressional authorization

[37] For the reasons stated by the Court of Appeals, *Ex parte Quirin*, 317 U.S. 1 (1942), upon which the government principally relies, does not support the detention of Padilla in this case. *Padilla*, 352 F.3d at 715-17.

[38] The government claims that, despite the plain and unqualified language of this statute, it does *not* apply to detention or imprisonment by the military. Pet. Br. 44-49. But the statute refers broadly to detention or imprisonment "by the United States," not by any particular department or agency of the Nation.

should be required before this Court permits the Executive to imprison citizens indefinitely only upon its own say-so.[39]

Amici do not question the power of the President, as Commander-in-Chief, to detain persons, even citizens, seized on an active field of battle. We recognize that the President has broad authority as Commander-in-Chief during a time of war or threat to the security of our Nation. *See, e.g., The Prize Cases*, 67 U.S. (2 Black) 635 (1862). But the exigencies of the battlefield present a vastly different circumstance than even the bustle of O'Hare Airport. There is little or no risk in this case of "fettering . . . a field commander" or "divert[ing] his efforts and attention from the military offensive abroad to the legal defensive at home." *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950). While the government suggests that Padilla was arrested on a "battlefield," Pet. Br. at 37-38, under its standards the "battlefield" against terrorism could extend throughout the world and the "hostilities" could be of indefinite and perhaps undefinable duration. Legal standards developed to deal with traditional wars cannot be imported wholesale into this very different context.

Amici recognize that these limitations might impede the investigation of a terrorist offense in some circumstances. It is conceivable that, in some hypothetical situation, despite the array of powers described above, the government might be unable to detain a dangerous terrorist or to interrogate him or her effectively. But this is an inherent consequence of the limitation of Executive power. No doubt many other steps could be taken that would increase our security, and could

[39] Congress does not lack the ability to act quickly in response to national emergencies. The Resolution authorizing the use of force was passed one week after the attacks of September 11; the far more complicated USA PATRIOT Act was passed less than seven weeks after those attacks.

enable us to prevent terrorist attacks that might otherwise occur. But our Nation has always been prepared to accept some risk as the price of guaranteeing that the Executive does not have arbitrary power to imprison citizens. *McNabb v. United States*, 318 U.S. 332, 343 (1943). It is amici's belief, moreover, that given the expansive authorities that otherwise exist, the risk to the Nation from denying the Executive the authority it seeks in this case is minimal. If additional Executive authority to detain citizens found within the United States is deemed necessary to protect against terrorism, that authority should come through congressional action, where the boundaries of that power can be defined, the terms of any such detention can be set, and the procedure can be subject to judicial oversight. This Court has never countenanced the untrammeled authority the Executive Branch seeks in this case; it should not do so now.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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ERIC H. HOLDER, JR. was Deputy Attorney General of the United States from 1997 to 2001, and Acting Attorney General in 2001. For over 20 years, he was a trial attorney in the Criminal Division of the Department of Justice. In 1988, he became an Associate Judge on the Superior Court for the District of Columbia. From 1993 to 1997, he served as the United States Attorney for the District of Columbia.

JEFFREY H. SMITH was the General Counsel of the Central Intelligence Agency from 1995 to 1996. In 1993, he was appointed by the Secretary of Defense to serve on the Commission to Review the Roles and Missions of the Armed Services. Previously, he chaired the Joint Security Commission established by the Department of Defense and the Central Intelligence Agency to review security policy and practices in the defense and intelligence communities.

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DONALD RUMSFELD,
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v.

JOSE PADILLA AND DONNA NEWMAN,
AS NEXT FRIEND FOR JOSE PADILLA,
Respondent,

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF *AMICUS CURIAE* OF COMPARATIVE LAW SCHOLARS AND EXPERTS ON THE LAWS OF THE UNITED KINGDOM AND ISRAEL IN SUPPORT OF RESPONDENT

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[1] Pursuant to Supreme Court Rule 37, *amici* state that counsel for a party did not author this brief in whole or in part; that no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief; and that the parties' written consents to the filing of this brief have been filed with the Court.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Both terrorism and democratic values transcend borders. Democratic allies of the United States also face threats of terrorism. Some, notably the United Kingdom and Israel, have long histories of fighting terrorism. This brief documents how dramatically the indefinite, incommunicado detention to which Petitioner has subjected Jose Padilla departs from the minimum procedural protections that other democracies provide detained suspected terrorists. Each of these democratic allies uses four controls to constrain executive authority to detain suspected terrorists: (1) legislation regulating detention; (2) time constraints; (3) access to counsel; and (4) meaningful judicial review. Petitioner seeks license from this Court to dispense with all four limits.

For nearly 21 months Petitioner held Jose Padilla, a citizen of the United States apprehended on U.S. soil, in incommunicado detention. When Petitioner eventually permitted Padilla to meet with his lawyers, he did so, he insists, as a matter of discretion, not due process. Press Release, Department of Defense, Padilla Allowed Access to Lawyer (Feb. 11, 2004), *at* http://www.dod.gov/releases/2004/nv20040211-0341.html. Petitioner continues to detain Padilla indefinitely, without charge, and without a meaningful opportunity to respond.

Petitioner's indefinite, incommunicado detention of Padilla violates the basic standards of due process and human rights that leading democracies accept. This brief, filed on behalf of an international group of comparative law scholars and experts on the laws of the United Kingdom and Israel, shows that the unrestrained power that the Executive

here seeks to exercise against a United States citizen – and seeks to justify by labeling Padilla an "enemy combatant" – has been rejected by democratic allies of the United States as incompatible with fundamental rights.[2] Two democratic allies with long experience fighting terrorism, the United Kingdom and Israel, have rejected incommunicado, indefinite detention as a tool in the war on terrorism. Moreover, the United States Department of State has condemned the use of such tools by authoritarian regimes as violations of basic human rights.

ARGUMENT

I. THE LAW, PRACTICE, AND EXPERIENCE OF OTHER DEMOCRACIES CAN USEFULLY INFORM THE JUDGMENT OF THE COURT

The laws and policies of other democracies, particularly those experienced in fighting terrorism, provide useful points of comparison that may properly inform this Court's deliberations. Since the founding of this country, this Court has addressed in a variety of contexts the relevance of international opinion and practice in interpreting U.S. law.

In supporting one of the Court's historic early rulings, Chief Justice Marshall invoked the "assent of mankind" as one persuasive indicator of the soundness of the Court's constitutional interpretation. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). In a case addressing the constitutional limits to the Executive's power in time of war,

[2] Although many democratic states are allies of the United States and although many provide similar procedural protections, we focus on the practices of close allies Australia, Canada, France, Germany, Israel, Spain, and the United Kingdom, which are referred to collectively in this brief as "democratic allies of the United States." Unless otherwise noted, references to Israel are to detention within the State of Israel. Detention in the West Bank and Gaza is subject to international humanitarian law and military law and will be discussed in Section II.B, *infra*.

this Court looked to precedents in English, as well as U.S., history, finding that "martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject." *Ex Parte Milligan*, 72 U.S. 2, 128 (1866). In deciding the constitutionality of imposing the death penalty on defendants with mental retardation, the Court considered "the views of . . . 'other nations that share our Anglo-American heritage, and . . . the leading members of the Western European community.'" *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2003) (confirming plurality opinion in *Thompson v. Oklahoma*, 487 U.S. 815, 830, 831, n.31 (1988) ("We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual") (plurality opinion)). And in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), the Court considered whether practices have "been accepted as an integral part of human freedom in many other countries," and have "been rejected elsewhere." *Id.* at 2483.

Although international precedents are not binding on U.S. courts, this Court has been willing to look to foreign practice for at least three reasons. First, the law of nations and international legal standards can be relevant to understanding the original intent of the drafters of the U.S. Constitution (particularly those provisions of the U.S. Constitution and other founding documents that were drafted in light of, or were intended to be compatible with, international legal standards).[3] Not only did the Declaration

[3] The founders also looked abroad for a proper understanding of the federal system. *See The Federalist No. 82*, ¶ 5 (Alexander Hamilton) ("The judiciary power of every government looks beyond its own local or municipal laws," so that a proper understanding of state court jurisdiction in a federal system is informed by "consider[ing] the State governments and the national governments . . . *in the light of kindred systems.*") (emphasis added).

of Independence seek to exhibit "a decent respect to the opinions of mankind," but Thomas Jefferson said the law of nations is "an integral part . . . of the laws of the land." Letter from Thomas Jefferson, Secretary of State, to M. Genet, French Minister (June 5, 1793), quoted in 1 John B. Moore, Digest of International Law 10 (1906). The Constitution itself declares that international treaties are the "supreme law of the land," and this Court ruled in an early landmark decision that laws adopted by the United States "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). As John Jay wrote in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793), by taking a place among the nations of the earth, "the United States had . . . become amenable to the law of nations." *Id.* at 474.[4]

Second, international jurisprudence and legal norms are relevant because, in the words of Justice Breyer, the "experience [of other nations] may . . . cast an *empirical light* on the consequences of different solutions to a common legal problem." *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (emphasis added). A decade earlier, Justice Brennan noted that this empirical perspective is particularly useful when striking the balance between civil liberties and national security: "Prolonged and sustained exposure to the asserted security claims may be the only way in which a country can gain . . . the expertise necessary to distinguish the bona fide from the bogus. . . . [I]t may well

[4] *See also Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); 1 Op. Att'y Gen. 26, 27 (1792) (opinion of Attorney General Randolph) ("The law of nations, although not specially adopted by the constitution, or any municipal act, is essentially a part of the law of the land.").

be Israel, not the United States, that provides the best hope for building a jurisprudence that can protect civil liberties against the demands of national security." Justice William J. Brennan, Jr., The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises, 18 Isr. Y.B. Hum. Rts. 11, 18-20 (1988). Other countries' experiences can thus provide important data to help this Court evaluate Petitioner's assertion that disregard of procedural safeguards is necessary to combat terrorism effectively. Particularly since the United States shares concepts of separation of powers and due process with other democratic societies, "there is much to be learned from . . . distinguished jurists [in other places] who have given thought to the difficult issues we face here." Justice O'Connor, Remarks at the Southern Center for International Studies (Oct. 28, 2003), *at* http://www.southerncenter.org/OConnor_transcript.pdf.

Third, international legal norms are relevant reference points because decisions of this Court play such an important role in shaping those norms. As a leading global proponent of the rule of law and fundamental human rights, the United States sets both a standard and an example within the community of nations. Just as the U.S. Department of State is viewed as an important evaluator of the human rights practices of other nations, *See* Section III, *infra*, this Court is looked to as a leading authority on human rights standards worldwide. A Supreme Court decision that places the United States apart from the community of nations by departing from international norms can affect the evolution of law throughout the world. *See infra* Section III. The effects of decisions by this Court on international jurisprudence are a useful lens through which to view the implications such decisions have for countries that share the values that define U.S. society.

In addition to language found in early decisions of this Court, comments by current members of the Court reflect this recognition of the value of considering international

norms. Chief Justice Rehnquist has observed that "now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." William Rehnquist, Constitutional Court-Comparative Remarks (1989), reprinted in *Germany and Its Basic Law: Past, Present, and Future – A German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

Other Justices have commented similarly. Justice O'Connor: "No institution of government can afford now to ignore the rest of the world," noting that conclusions reached by other countries, "[a]lthough ... rarely binding upon our decisions in U.S. courts, should at times constitute persuasive authority in American courts." Sandra Day O'Connor, Keynote address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), *in* 96 Am. Soc'y Int'l L. Proc. 348, 349-50 (2002). Justice Breyer: "[W]e find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison," adding that "[a]nalogous developments internationally ... tend similarly to produce cross-country results that resemble each other more and more, exhibiting common, if not universal, principles in a variety of legal areas." Stephen Breyer, Keynote Address before the 97th Annual Meeting of the American Society of International Law (April 4, 2003), in 97 Am. Soc'y Int'l L. Proc. 265, 266, 267 (2003). Justice Ginsburg: "[C]omparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights." Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 282 (1999).

Accordingly, Section II.A of this brief surveys the detention practices of principal democratic allies of the United States, including Australia, Canada, France, Israel,

Germany, Spain, and the United Kingdom. Section II.B focuses in particular on the United Kingdom and Israel, two close allies that have had long experience dealing with the violence of terrorism. This summary shows the ways in which the detention of suspected terrorists is (a) based on specific legislative authority, (b) time constrained, (c) conditioned on access to counsel, and (d) subject to judicial review. If this Court were to approve the indefinite incommunicado detention urged by Petitioner, it would make the United States an anomaly among its leading democratic allies.

Section III identifies authoritarian regimes that have adopted the practices at issue here and notes that the U.S. Department of State has criticized these regimes for using the same detention practices that the Executive has deployed against Padilla.

A decision by this Court that the Executive has inherent, unfettered power to detain a U.S. citizen indefinitely and incommunicado would not only place the United States at odds with its democratic allies, but would also leave it in the company of nations whose practices the United States has consistently condemned.

II. OTHER DEMOCRACIES USE DETENTION TO FIGHT TERRORISM WITHOUT SACRIFICING CHECKS AND BALANCES OR FUNDAMENTAL DUE PROCESS

Even when faced with terrorism, democratic allies of the United States have declined to adopt detention practices that disregard fundamental civil liberties.

A. Australia, Canada, France, Germany, Israel, Spain, and the United Kingdom all use detention to fight terrorism while retaining legislative oversight, time constraints on detention, assistance of counsel, and meaningful judicial review

Legislative Authorization. The laws governing our allies' detention of suspected terrorists are authorized and regulated by specific and detailed legislation. This requirement of a legislative mandate provides a check on the otherwise unfettered power of the Executive. In each country, explicit statutory provisions explicitly authorize the detention of suspected terrorists for interrogation while according them certain basic procedural safeguards and protections, including time constraints on detention, access to counsel, and meaningful judicial review.[5]

Time constraints on detention. Democratic allies have set time limits on how long suspects may be detained before

[5] Australian Security Intelligence Organisation Act 1979, No. 113 (1979) (Austl.), *amended to include anti-terrorism provisions by* Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003, No. 77 (2003), amend. 24 (Austl.); Criminal Code, R.S.C. 1985, c. C-46 §§ 83.29(3), 83.3(6)-(8) (Can.), *at* http://laws.justice.gc.ed/C-46/40997.html, *amended by* Anti-Terrorism Act 2001, Ch. 41 (Can.); C. PR. PÉN., arts. 63, 63-4, 706-73, 706-88 (Fr.), *last modified by* Law No. 2004-204 of Mar. 9, 2004, J.O. Mar. 10, p. 4567; Criminal Procedure Code §§ 112 *et seq.* StPO (F.R.G.); Emergency Powers (Detention) Law, 1979, 33 L.S.I. 89 (1978-79) (Isr.), and Incarceration of Unlawful Combatants Law, 2002 (Isr.), *at* www.justice.gov.il/NR/rdonlyres/8459847C-84FD-956D-0F2CB10C948A/0/IncarcerationLaw L.438/01; Constitución Española [C.E.] art. 17 (Spain); L.E. CRIM. arts. 384, 489, *et seq., last modified by* Law on Management of the State (B.O.E., 2003, 41842); Terrorism Act, 2000, c.11, ¶ 41, sched. 8 (Eng.), and Anti-Terrorism, Crime and Security Act, 2001, c. 24, pt. 4 (Eng.). Hereinafter *amici* refer this Court to the Appendix for further elaboration of the statutory provisions authorizing detention of suspected terrorists by the democratic allies of the United States.

that detention is subject to meaningful judicial review. Most legislation cited here sets an absolute limit on the length of time a suspect may be detained without charge. Israel limits the length of any detention order but not the number of times an order may be renewed. Instead, it provides for judicial scrutiny and review of renewal requests. *See infra* pages 23-25. In no case does the legislation of democratic allies permit indefinite detention of the type that Petitioner here asserts the right to use.[6]

Access to counsel. Another central element of the detention policies of the democratic allies is access to counsel.[7] Each of these countries provides for access to a lawyer soon after detention begins. In most instances, access to counsel is provided within hours; in no instances is the right to counsel denied for more than a few days.[8] And even where the right to counsel can be delayed for a few days, the delay must be authorized through established procedures that are subject to review.[9]

Judicial review. Finally, continuing judicial review of the necessity and legality of detention is a feature common to the legislative frameworks of other democracies dealing with threats of terrorism. Some require judicial approval prior to the arrest of suspects. Others provide specific time periods before which detainees must be brought before a judge.[10] And although some countries provide that detention may be extended for investigative or preventive reasons, they subject such extensions to judicial review, and suspects have the opportunity to challenge continued detention before an independent judicial authority. Moreover, the examples of

[6] *See* sources cited *infra* Appx.

[7] *See* sources cited *infra* Appx.

[8] *See* sources cited *infra* Appx.

[9] *See* sources cited *infra* Appx.

[10] *See* sources cited *infra* Appx.

the United Kingdom and Israel show that judicial review may be available not only to enforce explicit statutory rights but also to guarantee fundamental due process limits on detention.[11]

In the section that follows, we examine in greater detail the experiences of the United Kingdom and that of Israel. Both countries share U.S. democratic values and have significant histories and extensive experience in dealing with the continuing threat and recurring reality of terrorism.

B. The United Kingdom and Israel, with long experience fighting terrorism, guarantee fundamental due process rights to suspected terrorists

In considering Petitioner's claim of inherent constitutional authority to detain citizens suspected of terrorism indefinitely and incommunicado, the experiences of the United Kingdom and Israel are particularly instructive. These democratic allies of the United States have been fighting terrorism for decades, and both detain suspected terrorists.

The United Kingdom and Israel have quite different systems of detention. In the United Kingdom, suspected terrorists may be detained by police during the course of criminal investigations. Certain foreign nationals may also be detained by immigration authorities. In Israel, suspected terrorists may be subject to administrative detention. In the West Bank and Gaza, suspects may also be detained by the military during military operations. Notwithstanding these

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[11] *See* pp. 13, 23-26, *infra*. The International Covenant on Civil and Political Rights, art. 9, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 and the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, Nov. 4, 1950, 213 U.N.T.S. 221, also mandate timely judicial review of the detention of suspects."

differences, each of these systems shares a recognition of basic due process rights.

1. The United Kingdom

The United Kingdom has confronted terrorist activity on a large scale since "the Troubles" began in Northern Ireland in the late 1960s.[12] Arriving in Northern Ireland in 1970 in the wake of armed conflict between Protestant Loyalists and the Irish Republican Army, the U.K. Army faced continual acts of terrorism. During the first seven months of 1971 there were 304 bomb blasts, killing thirty-one people, and in December 1971, a car bomb in Belfast killed fifteen Catholics. From August 1971 to March 1972, when the Parliament assumed direct rule over Northern Ireland, there were 1,130 explosions, 2,000 shootings, and 233 deaths, including 158 civilians. On July 21, 1972, "Bloody Friday," twenty bombs exploded in Belfast, killing eleven and seriously wounding more than 100.

Terrorism was also a constant and deadly presence in England. In October 1974, the bombing of a Guildford pub killed five and injured fifty-four. In November, two more pubs were bombed in Birmingham, killing twenty-one and injuring 184. In 1979, a British Member of Parliament was assassinated, killed by a car bomb within steps of the House of Commons. In July 1982, an attack on a U.K. army unit participating in a London parade killed eleven and wounded thirty. The following December a car bomb outside Harrod's department store killed six and seriously injured ninety-three. Over the twenty-year period ending in 1990, in Northern Ireland alone more than 2,750 people were killed (2,000 of them civilians) and more than 31,900 were seriously injured. This occurred in a territory with a

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[12] The following historical account is adapted from Stephen J. Schulhofer, *Checks and Balances in Wartime*, 102 Mich. L.Rev. 1501, 1517-19 (2004). *See also, Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25, ¶¶ 81-84 (1978).

population of only 1.5 million – about the same as the current population of Philadelphia.[13]

The United Kingdom's legal structure evolved and was refined over a long period. After initially relying on the Special Powers Act of 1922, which authorized detention (including, in certain circumstances, indefinite detention), the Parliament began in 1972 to regularize and limit the government's authority to detain suspected terrorists.[14] In November 1974, the United Kingdom Parliament enacted the Prevention of Terrorism (Temporary Provisions) Act ("PTA"). Temporary legislation that was regularly renewed for decades, the PTA created new governmental powers to detain and interrogate suspected terrorists. In keeping with U.K. criminal law, the PTA required "reasonable grounds" for arrest and imposed a forty-eight hour limit on detention. It also provided for extension of detention in order to allow for additional interrogation, but such extensions required authorization by a cabinet-level official and were limited to a maximum of an additional five days. Detainees were

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[13] *See Fox, Campbell & Hartley v. United Kingdom*, 13 Eur. H.R.Rep. 157, ¶ 15 (1991). During the mid-1980s, a series of temporary truces reduced the fatality rate, but terrorism persisted on a wide scale until the early 1990s. In the context of peace negotiations, the IRA announced an end to its military operations in August 1994, U.K. army patrols were reduced or suspended, and in April 1998 the Good Friday Accords began an era of relative peace. Even then, terrorist actions by splinter groups continued. In July 1998, a Loyalist bomb killed three children in their home, and a month later a dissident faction of the IRA detonated a car bomb in a small town, killing twenty-nine and injuring over 200. Marie-Therese Fay, Mike Morrissey & Marie Smyth, Northern Ireland's Troubles: The Human Costs 43-49 (1999).

[14] The Civil Authorities (Special Powers) Act (Northern Ireland) 1922 was repealed in 1973 by the Northern Ireland (Emergency Provisions) Act 1996 (EPA). Like the PTA, the EPA was repealed by the Terrorism Act 2000.

guaranteed access to counsel by the forty-eight hour mark and ordinarily before that time.[15]

Under the European Convention on Human Rights, the United Kingdom's detention of suspected terrorists was, and remains, subject to review by the European Court of Human Rights. In *Brogan and Others v. United Kingdom*, 11 Eur. H.R. Rep. 117 (1988), the court held that the need to conduct an interrogation could not justify a detention of four days and six hours without presentment in court, and the detentions therefore violated Article 5(3) of the European Convention. In response, the United Kingdom entered a "derogation" from Article 5, which the Convention permits when "strictly required by the exigencies of the situation." Such a derogation is itself subject to review by the European Court of Human Rights. In *Brannigan & McBride v. United Kingdom*, 17 Eur. H.R. Rep. 539 (1994), the court upheld the derogation in a case involving delays for interrogation of up to seven days. It did so only after emphasizing that the detentions were excessive by only a few days and that the suspects had access to counsel after no more than forty-eight hours.[16]

The United Kingdom ultimately rejected the PTA's provision for five-day extensions of detentions pursuant to cabinet-level authorization as insufficiently protective of individual rights. In response to a series of independent reviews that reported abuses,[17] Parliament adopted

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[15] *See Brannigan & McBride v. United Kingdom*, 17 Eur. H.R.Rep. 539 ¶ 64 (1994).

[16] *Brannigan*, 17 Eur. H.R.Rep. at ¶¶ 63-64. Subsequently, in *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1996), the court rejected a derogation because the detention at issue was 14 days, which the court deemed "exceptionally long," and was not accompanied by legally guaranteed access to counsel. *Id.* ¶¶ 78, 81.

[17] *See* Lord Shackleton, Report of the Operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976 (1978), summary

(footnote continued on next page)

legislative reforms that required enhanced administrative and medical supervision, better documentation, and a code of conduct for interrogators. Yet problems remained, especially the absence of judicial review and other procedural protections. Access to counsel, for example, was restricted; all access could be denied for a period of up to forty-eight hours, and meetings between lawyer and client could be (and were) monitored.[18] Later revelations of wrongful convictions in a number of prominent terrorism prosecutions, such as the "Birmingham Six," the "Guildford Four," and the Judith Ward case,[19] ultimately led to further legislative reforms.

Based on this extensive experience of balancing civil liberties and national security, Parliament enacted its most recent statutes governing the Executive's authority to detain suspected terrorists. The Terrorism Act 2000, c. 11 (U.K.) (the "2000 Act") replaced the PTA and further circumscribed the government's authority to detain suspected terrorists. The 2000 Act prohibits indefinite detention, mandates due process protections for terrorist suspects, and provides for critical oversight by the judiciary. The 2000 Act continues to treat investigations of terrorism as criminal investigations, retains the seven-day limit for detentions, subjects detentions

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available at http://www.bopcris.ac.uk/bop1974/ref4807.html; Earl Jellicoe, Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976 (1983), *available at* http://www.bopcris.ac.uk/img1984/ref3808_1_1.html; Judge H.G. Burnett, QC, Report of the Committees of Inquiry into Police Interrogation Procedures in Northern Ireland (1979), *available at* http://cain.ulst.ac.uk/hmso/bennett.htm.

18 *See* Police and Criminal Evidence Act, 984 (Eng.); Schulhofer, *supra* at 1522-23.

19 *See Birmingham Six: R. v. McIlkenny* [1992] 2 All E.R. 417, C.A. (Crim.); *Guildford Four: R. v. Maguire* [1992] 1 QB 936, C.A. (Crim); *Judith Ward: R. v. Ward* [1993] 1 W.L.R. 619, C.A. (Crim.).

to legislative requirements, and provides the detainee repeated opportunities to respond to the allegations against him.

Without a warrant, police may arrest an individual they "reasonably suspect to be a terrorist," but must release or charge him or her after forty-eight hours unless a court approves an extension of a maximum five additional days.[20] Detainees have a right to notify a designated individual of their detention[21] and to have access to counsel "as soon as is reasonably practicable, privately and at any time."[22]

The 2000 Act also requires a reviewing officer ("an officer who has not been directly involved in the investigation"[23]) to determine whether detention is necessary "as soon as is reasonably practicable" and every twelve hours thereafter during the first forty-eight hours.[24] Before determining whether to authorize continued detention, the reviewing officer must provide a written explanation of the reasons for the extension and an opportunity for the detainee or his counsel to respond.[25] Detention may be continued during the first forty-eight hours only if a reviewing officer determines that further detention is "necessary."[26]

One of the most significant revisions in the 2000 Act is the replacement of absolute executive authority to detain suspects for seven days with judicial review of the application of the police to extend detention beyond the

20 Terrorism Act, 2000, c. 11, § 41(3), Schedule 8, ¶ 29.

21 *Id.* at Schedule 8, ¶ 6.

22 *Id.* at Schedule 8, ¶ 7. The act provides for some discretion for delay limited to forty-eight hours. *See id.* at Schedule 8, ¶ 8.

23 *Id.* at Schedule 8, ¶ 24(1).

24 *Id.* at Schedule 8, ¶ 21(1)-(3). These reviews may be postponed, but only for a limited period and for reasons expressly defined by the legislature. *Id.* at Schedule 8, ¶ 22.

25 *Id.* at ¶ 26(1).

26 *Id.* at Schedule 8, ¶ 23.

initial forty-eight hours.[27] The judicial authority must be satisfied that continued detention is "*necessary* to obtain relevant evidence" and that the investigation is "being conducted diligently and expeditiously."[28] The government must apply for an extension within the initial forty-eight hour period or, at the very latest, within six hours of the end of that period.[29] The detainee is provided notice of the government's application for a five-day extension[30] and is given the opportunity to respond with representation by counsel.[31]

Following the attacks of September 11, 2001, Parliament adopted additional anti-terrorism legislation, the Anti-Terrorism, Crime and Security Act 2001, c.24 (Eng.) (hereinafter ATCSA). The ATCSA affects only one narrow category of detainees, namely foreign nationals whom the government can neither prosecute nor deport. Citizens of the United Kingdom continue to be subject only to the 2000 Act.

The ATCSA addresses both the detention of foreign national terrorist suspects and the protections to which they are entitled.[32] Part Four of the ATCSA expands executive authority to allow the potentially indefinite detention of foreign nationals suspected of involvement with an international terrorist activity or group where neither

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[27] *Compare* PTA, § 7(2) (authorizing extended detention based on approval by the Secretary of State for Northern Ireland) *with* Terrorism Act 2000 ¶ 29 (requiring application to judicial authority to extend detention beyond forty-eight hour period). By providing for judicial review after forty-eight hours, the United Kingdom was able to withdraw its derogation from the European Convention.

[28] *Id.* at ¶ 32(a)-(b) (emphasis added).

[29] *Id.* at ¶ 30(l).

[30] *Id.* at ¶ 31.

[31] ¶ 33(1)(a), (b). Furthermore, the judicial authority must adjourn the hearing if a detainee requests representation by counsel. ¶ 33(2).

[32] *See generally* ATCSA, §§ 21-23.

prosecution nor removal is possible. However, these provisions, which the U.K. government has said are to be used only as a "last resort," are subject to vigorous legislative oversight and judicial review.[33] For example, Part Four of the ATCSA requires the Home Secretary to certify that he reasonably believes that the detainee is an international terrorist and that his presence in the United Kingdom is a risk to national security.[34] Every certification by the Home Secretary is then subject to two levels of review.[35] First, a detainee may appeal to the Special Immigration Appeals Commission (SIAC), a superior court of record composed of at least three members and led by a judge. If the SIAC finds no reasonable grounds for the Home Secretary's belief that the person is a suspected terrorist or poses a threat to national security, it must cancel the certificate.[36] Second, if the SIAC decides not to cancel

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[33] Privy Counsellor Review Committee, 2003, Anti-terrorism, Crime and Security Act 2001 Review: Report, H.C. 100 50 (Dec. 18, 2003) (hereinafter Newton Comm. Report).

[34] §§ 21-23.

[35] Special Immigration Appeals Commission Act, 1997, c. 68 (Eng.), as amended by ATCSA, § 35. In such an appeal, the detainee has the right to legal representation. The hearings are generally open to the detainee and his counsel, but even where security considerations require that a portion of a hearing be closed, an independent "special advocate" is present to represent the interests of the detainee. At closed hearings, the special advocate reviews sensitive material *in camera*, makes submissions to the SIAC, and cross-examines witnesses. Special Immigration Appeals Commission (Procedure) Rules (2003), Rule 37; Rule 35.

[36] *Id.* at § 25. In a case decided last month (March 2004), the Court of Appeals affirmed the SIAC's cancellation of an executive certificate of detention. *See Sect'y of State for the Home Dep't. v. M*, [2004] All E.R. 367 (C.A.) (Mar. 18, 2004). While recognizing the wide latitude that the Home Secretary necessarily enjoys under the ATCSA, the court stated:

> While the need for society to protect itself against acts of terrorism is self evident, it remains of the greatest importance

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the certificate, the detainee may appeal that decision to the Court of Appeals, and thereafter to the House of Lords.

Even with the procedural protections imposed by Parliament, the ATCSA's provisions for indefinite detention of non-national terrorist suspects were criticized for requiring the United Kingdom to derogate from the European Convention for the Protection of Human Rights and Fundamental Freedoms.[37] In response to this criticism, Parliament conditioned executive authority to detain foreign nationals under the ATCSA on annual renewal of legislative approval by inserting an annual sunset provision.[38]

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> that, in a society which upholds the rule of law, if a person is detained as 'M' was detained, that individual should have access to an independent tribunal or court which can adjudicate upon the question of whether the detention is lawful or not. If it is not lawful, then he has to be released.

Id. at ¶ 34(iii).

[37] The U.K. Government has acknowledged that the power to detain indefinitely under § 23 of Part IV of the ATCSA derogates from the right of liberty contained in Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The U.K. government declared a public emergency and notified the Council of Europe of a derogation from Article 5 of the ECHR. *See* Explanatory Notes to the Anti-terrorism, Crime and Security Act, 2001, c. 24, ¶¶ 73-76 (U.K.). *Amici* note that the United Kingdom and Turkey are the only members of the Council of Europe that have chosen to derogate from its obligations under Article 5 of the European Convention.

[38] *See* § 29 of Part IV of ATCSA. The indefinite detention provisions (§§ 21-23) will permanently expire on November 10, 2006. *See* § 29(7). *Amici* note that several aspects of the detention procedures under Part 4 are presently subject of litigation. The distinction drawn between citizens and non-citizens under the ATCSA was held unlawfully discriminatory by the SIAC, but this decision was reversed by the Court of Appeal. *See A. v. Sect'y of State for Home Dep't*, [2002] EWCA Civ. 1502, [2003] 2 W.L.R. 564 C.A. (Civ). The House of Lords granted leave to appeal. *See* [2003] 1 W.L.R. 1994 H.L. In the same proceedings, the House of Lords is considering whether the derogation from Article 5 of the European Convention on Human Rights to permit

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The ATCSA further mandates that the Secretary of State appoint a person to review the statute in practice and that a Privy Council committee comprehensively review the ATCSA within two years after its enactment.[39] This Privy Council Review Committee expressed grave concerns about the principle, efficacy, and practice of indefinite detention and strongly recommended "that the Part 4 powers which allow foreign nationals to be detained potentially indefinitely . . . be replaced as a matter of urgency."[40]

In sum, the choices made by the United Kingdom through long experience contrast sharply with Petitioner's pursuit of an incommunicado detention standard for the United States.

2. Israel

Although Israel has faced, and vigorously fought, terrorism since its founding in 1948, it has done so without resorting to the measures Petitioner claims are necessary in

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indefinite detention is unlawful on other grounds. *Amici* take no position concerning this pending litigation. *Amici* include this discussion of the ATCSA only to emphasize that even after September 11, Parliament has not authorized the government to subject individuals to indefinite incommunicado detention without some opportunity to be heard.

[39] ATCSA, §§ 28, 122. Lord Carlile of Berriew QC was appointed by the Secretary of State to assess the statute in practice and submitted a report last February. *See* Lord Carlile of Berriew, QC, Anti-Terrorism Crime and Security Act 2001, Part IV, Section 28 Review 2003 (2004). Among other things, Lord Carlile reported that the government generally had not abused its Part 4 authority, but also noted that grounds for detention for short periods of time "may be insufficient for indefinite detention." *Id.* at 9.

[40] Newton Comm. Report at 56. This Report recommended that new legislation deal similarly with all terrorists, regardless of nationality, and not require a derogation from the European Convention on Human Rights. *Id.* at 56. *See also* Joint Committee on Human Rights, Anti-Terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4, at 16 (hereinafter "Joint Committee Report")

the United States. Like the United Kingdom, Israel regulates detention legislatively, imposes time constraints on detention (although Israel does not limit the number of times detention may be renewed with judicial approval), allows detainees access to counsel, and affords detainees judicial review. [41]

Terrorist violence against Israel, always a concern, escalated after the 1967 war. In the late 1960s and throughout the 1970s, terrorist organizations conducted a series of devastating attacks in Israel. In the 1980s, terrorists launched attacks against Israel from Lebanon. Beginning in December 1987, Israel faced the first intifada and violent demonstrations in the Gaza Strip designed to force the Israeli military from the West Bank and Gaza and to establish an independent Palestinian state.[42]

During the second intifada, beginning in September 2000, terrorist violence intensified, with well over eight hundred attacks on Israel to date. Between September 2000 and June 2003, 243 Israelis were killed and more than 1400 wounded in a nation of about six million as a result of terrorist suicide bombings by Hamas organizations alone.[43] Although Israel has responded vigorously to this ongoing threat within its borders, it has continued to recognize the fundamental constraints that Petitioner asks this Court to ignore.

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[41] This discussion pertains to detention within the State of Israel. Discussion of detention in the West Bank and Gaza follows, *infra* at 26-27.

[42] *See, generally*, Israel Ministry of Foreign Affairs, History – The State of Israel *at* www.israel-mfa.gov.il/mfa/history/history%20of%20Israel.

[43] *See* Israel Ministry of Foreign Affairs, *Summary of Terrorist Attacks Recently Thwarted by Security Services, at* http://www.mfa.gov.il/MFA/Government/Communiques/2003/Summary+of+Terror+Attacks+Recently+Thwarted+by+Sec.htm (last modified June 11, 2003).

Israel inherited laws and procedures for administrative detention from those established during the time of the British Mandate for Palestine (1922-48). After statehood, Israel codified the pre-1948 laws through the Law and Administrative Ordinance of 1948.[44] It later reformed its detention law to provide both for access to counsel and judicial review in the Emergency Powers (Detention) Law of 1979 (the "Detention Law").[45]

Israeli law mandates that detention must be pursuant to specific legislative authorization "and to an extent no greater than required."[46] The Detention Law continues to regulate detention within Israel. It confers authority on the Minister of Defense to detain both Israeli citizens and non-citizens within Israel if he finds "reasonable cause to believe that reasons of state security or public security" require detention.[47]

The law is replete with procedural protections. It provides that a detainee is not only entitled to access to counsel[48] but also must be brought before the President of the District Court in the jurisdiction of arrest within forty-

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[44] Law and Administration Ordinance, § 11, 1948, 1 L.S.I. 7 (1948).

[45] Emergency Powers (Detention) Law 1979, 33 L.S.I. 89 (1978-79). Although this statute applies only in an official state of emergency, Israel has been in such a state since its founding in 1948.

[46] Basic Law: Human Dignity and Liberty, 1992, *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm ("There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise ... except by a law benefiting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than required." *Id.* §§ 5, 8); *see also* A.D.A. 7/94, *Ben Yoseph v. State of Israel* (given Sept. 1, 1994), ¶ 3 (affirming requirement of legislative authorization for administrative detention).

[47] *Id.* § 2(a).

[48] However, a detainee's counsel can be restricted to members of the bar "authorized . . . to act as military defense counsel." *Id.* § 8(b).

eight hours of detention.[49] The District Court's review is essentially *de novo*. It is required to exercise its own independent discretion in reviewing the suitability of the detention order.[50] The court must vacate the detention order if it does not find "objective reasons of state security or public security" that require the detention or if the detention "was made in bad faith or from irrelevant considerations."[51] A detainee may appeal the District Court's decision directly to the Supreme Court of Israel.[52]

In addition to the initial hearing, the District Court must review the detention order within three months.[53] The Minister of Defense may extend the detention order for a period of up to six months.[54] While consecutive extensions are permitted, judicial review is required at least every three months.[55] Detainees also have the right to counsel and to be present at these review hearings, although, as with the initial hearing, evidence may be sealed for security reasons.[56]

In addition to the District Courts, the Supreme Court of Israel has taken an active role in reviewing detention authority.[57] The court has been attentive to the human rights

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[49] *Id.* § 4(a). In the Israeli judiciary, the five District Courts sit above the Magistrates' Courts and below the Supreme Court. Detention cases are included in a category of important cases for which the District Court has original jurisdiction and the Supreme Court has appellate jurisdiction. *See* Basic Law: Judicature, 1984, 38 L.S.I. 101 (1983-84).

[50] Baruch Bracha, *Checks and Balances in a Protracted State of Emergency—The Case of Israel*, 33 Isr. Y.B. Hum. Rts. 123, 148 (2003).

[51] Detention Law, § 4(c), 1979, 33 L.S.I. 89.

[52] *Id.* § 7(a).

[53] *Id.* § 5.

[54] *Id.* § 2(b).

[55] *Id.* § 5.

[56] *Id.* § 8(a), 6(c).

[57] *See* Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to*
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concerns raised by administrative detention, especially after the Knesset enacted the Basic Law: Human Dignity and Liberty, in 1992.[58] For example, the court has noted that administrative detention is a severe and unusual measure which is difficult to reconcile with democratic values and therefore should be resorted to only if less restrictive means would not suffice.[59]

Exercising active judicial review, the Supreme Court held in 1999 that the 1979 law does not confer authority to detain persons who are not themselves terrorist threats as "bargaining chips."[60] In response, the Knesset enacted the 2002 Incarceration of Unlawful Combatants Law.[61] This law extends the power of detention to members of a force perpetrating hostile acts against Israel even without a showing of actual or threatened personal involvement in such acts.[62] So far as *amici* have been able to determine, this law has not been used since its application in the case that inspired it, which involved a potential prisoner exchange with Lebanon.

In any case, the law provides for access to counsel and judicial review. A detainee under the statute must be brought before a District Court judge within fourteen days of

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Hold Terrorists as Bargaining Chips?, 18 Ariz. J. Int'l & Comp. Law 721, 758 (2001).

[58] Basic Law: Human Dignity and Liberty, 1992, *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

[59] A.D.A. 7/94, *Ben Yoseph v. State of Israel* (given Sept. 1, 1994), ¶ 3.

[60] Further Hearing [F.H.] 7048197, *Plonim v. Minister of Defense*, 54(1) P.D. 721 (original in Hebrew; summarized in English *in* 30 Isr. Y.B. Hum. Rts. 340 (2000)).

[61] Incarceration of Unlawful Combatants Law, 2002, *available at* http://www.justice.gov.il/NR/rdonlyres/7E86D098-0463-4F37-A38D-8AEBE770BDE6/ 0/IncarcerationLawedited140302.doc (last visited Apr. 9, 2004).

[62] *Id.* § 2.

incarceration to determine the appropriateness of the detention, and may appeal that decision to the Supreme Court.[63] The statute directs that a detainee must have the opportunity to meet with a lawyer "at the earliest possible date that meets State security requirements," but in any case no later than seven days after the detention order is approved.[64] Like the 1979 Detention Law, the 2002 Unlawful Combatants Law provides for administrative detention orders that are legislatively authorized, that are initially limited in time but renewable upon a proper showing to a judge, and that are subject to judicial review with access to counsel.[65]

The West Bank and Gaza. The West Bank and Gaza lie outside the borders of the State of Israel and are therefore subject to the laws of war rather than legislative enactments governing domestic detention. Even so, the detention regime employed by Israel in the West Bank and Gaza provides robust judicial review. Israel's "Basic Law: Judicature," vests the Supreme Court of Israel with authority over detention in the West Bank and Gaza.[66] Acting as the High Court of Justice, the court may "hear matters in which it

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[63] *Id.* §§ 5(a), 5(d).

[64] *Id.* § 6(a). As with the 1979 law, counsel may be limited to those authorized to appear before the military courts. *Id.* at § 6(b).

[65] Following the initial hearing, the detention must be reviewed by the District Court at least every six months, in contrast to every three months under the 1979 law. *Id.* § 5(c). The detainee can be held until the Minister of Defense determines that the group with which the detainee is associated has ceased hostilities against Israel or until a court determines that the detainee's release would not threaten state security. *Id.* § 8. At detention hearings the Minister of Defense is entitled to a presumption in favor of his determination. *Id.* § 7.

[66] Basic Law: Judicature § 15(c) (vesting the Supreme Court of Israel with jurisdiction as the final court of appeals in cases involving domestic law, and as a High Court of Justice, which is a court of first instance, in cases arising from detention orders in the West Bank and Gaza).

deems it necessary to grant relief for the sake of justice."[67] Detainees have a right to appeal military law and orders directly to the High Court of Justice.[68]

In its capacity as the High Court of Justice, the court has recognized that the detainees' right of appeal carries with it a guarantee of due process. For example, when -- like Petitioner in this case -- the military asserted that extended incommunicado detention was necessary to permit interrogation of suspected terrorists, the Supreme Court rejected the military's assertion of unilateral authority to curtail individual rights without prompt judicial review. In 2002, in *Marab v. IDF Commander in the West Bank*, the court reviewed a military order that authorized the detention of Palestinians for up to twelve days before judicial review. Rejecting the military's claim that a need for effective interrogation justified this practice, the court held that a twelve-day period without judicial review "unlawfully infringe[d] upon the judge's authority, thus infringing upon the detainee's liberty, which the International and Israeli frameworks are intended to protect."[69] The court also recognized the right of a detainee "to be visited by the Red Cross" and to have his family "informed of his whereabouts."[70] Thus, even in the West Bank and Gaza, and at a time of intense terrorist activity, the judiciary has subjected detention practices to careful scrutiny to guarantee basic human rights and has limited the military's ability to detain suspects indefinitely and incommunicado.

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[67] *Id.*

[68] *See, e.g.*, H.C.J. 3239/02, *Marab v. IDF Commander*, 57 (2) P.D. 349 (Heb.) (reviewing the detention of Palestinians by the military).

[69] *Id.* ¶ 35.

[70] *Id.* ¶ 46. In *Marab*, the court also upheld the order's provision allowing detention without access to counsel for four days with extensions available for up to 32 days.

III. THE U.S. DEPARTMENT OF STATE CONDEMNS OTHER COUNTRIES' DETENTION OF SUSPECTS INDEFINITELY AND INCOMMUNICADO AS A VIOLATION OF FUNDAMENTAL HUMAN RIGHTS.

When other governments have detained persons in ways that resemble the detainment of Mr. Padilla, the U.S. government consistently has condemned those practices as human rights violations. Each year the State Department submits to Congress a report "Country Reports on Human Rights Practices" describing human rights in most countries of the world.[71] By holding a U.S. citizen in prolonged, incommunicado detention without charge, Petitioner has placed the United States in the company of regimes the United States itself has identified as abusers of human rights.

The State Department has recently condemned North Korea for such abuses.[72] In Iran, the State Department found that "[c]ontinuing serious abuses included" were similar.[73] And the State Department condemned Saddam Hussein's

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[71] These annual reports are submitted pursuant to § 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as amended, and § 504 of the Trade Act of 1974, as amended. These statutes require that the Secretary of State submit reports to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate on countries that receive foreign aid from the United States specifically as well as those that are members of the United Nations more generally. The reports are released annually by the Bureau of Democracy, Human Rights, and Labor. *See* Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Country Reports on Human Rights Practices for 2003 (2004) (hereinafter 2003 Human Rights Reports) *available at* http://www.state.gov/g/drl/rls/.

[72] *See* 2003 Human Rights Report for North Korea, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27775.htm ("There are no practical restrictions on the ability of the Government to detain and imprison persons at will and to hold them incommunicado.").

[73] 2003 Human Rights Report for Iran, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27927.htm.

Iraq for "detention, often for long periods of time, without access to a lawyer or the courts."[74] In many countries with "poor" or even "extremely poor" records, the length of detention has been shorter than the detention at issue here.[75]

Countries that do not permit detainees to meet with counsel or family members receive similar criticism. For instance, the Governments of Burma, Cambodia, China and Malaysia were all rebuked for denying their detainees access to counsel, and the State Department particularly criticized the judiciary's acceptance of the Malaysia's assertion that access to counsel could be denied because it would interfere with an ongoing investigation.[76] Ecuador was criticized for allowing detainees without lawyers to wait as long as a year before being tried or released.[77] Likewise, Saudi Arabia was criticized for allowing detainees "only limited contact with

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[74] 2003 Human Rights Report for Iraq, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27928.htm. According to Petitioner, the interim Constitution of Iraq provides "the right to a fair, speedy and open trial . . . [and] prohibits . . . arbitrary arrest and detention." Donald H. Rumsfeld, *The Price of Freedom in Iraq*, N.Y. Times, March 19, 2004 at A23.

[75] *See* 2003 Human Rights Reports on Bangladesh, Belarus, Ethiopia, Macedonia, Mexico, Morocco, Nigeria. Even in countries where incommunicado detention is limited, usually to days, the State Department has nevertheless identified these detentions as human rights issues. *See, e.g.*, 2003 Human Rights Reports on Egypt, Fiji, Morocco, Oman, Peru, *available at* http://www.state.gov/g/drl/rls/hrrept/2003/index.htm.

[76] *See* 2003 Human Rights Report for Burma *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27765.htm; 2003 Human Rights Report for Cambodia, *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27766.htm; 2003 Human Rights Report for China, *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27768.htm, 2003 Human Rights Report for Malaysia, *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27778.htm.

[77] 2002 Human Rights Report for Ecuador *at* http://www.state.gov/g/drl/rls/hrrpt/2002/18330.htm.

their families or lawyers,"[78] and similar concerns were raised about the manner in which the Oman treats its detainees.[79]

The United States has identified markers of progress, while remaining quick to point out inadequacies in enforcement.[80] These examples all make the same point: lengthy incommunicado detention is a universally recognized human rights violation, widely practiced by authoritarian regimes and consistently condemned by the United States citing the international law of human rights.

CONCLUSION

For these reasons, *amici* respectfully urge this Court to affirm the judgment of the Court of Appeals.

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[78] 2002 Human Rights Report for Saudi Arabia, *at* http://www.state.gov/g/drl/rls/hrrpt/2002/18288.htm.

[79] 2002 Human Rights Report for Oman, *at* http://www.state.gov/g/drl/rls/hrrpt/2002/18285.htm.

[80] *See, e.g.*, 2003 Human Rights Report for India *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27947.htm ("The Prevention of Terrorism Act (POTA), enacted in March 2002 allows detention without charge for 3 months, and 3 more months if allowed by a special judge"); 2003 Human Rights Report for Pakistan, *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27950.htm (maximum detention period of 90 days but instances reported of imprisonment without charge for as much as 6 months); 2003 Human Rights Report for Morocco, *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27934.htm (12-day maximum detention period in terrorism cases, with the government criticized for having denied access to counsel or family members initial detention period); 2003 Human Rights Report for Algeria *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27926.htm (12-day detention permitted when there is a state of emergency); 2003 Human Rights Report for Turkey *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27869.htm (maximum detention period of seven days).

[81] Counsel acknowledge with thanks the assistance of the students in the Allard K. Lowenstein International Human Rights Clinic at the Yale Law School in the preparation of this brief.

SUMMARY OF DETENTION LEGISLATION FOR CITIZENS OF U.S. DEMOCRATIC ALLIES

Country	**Australia**
Legislative Authority	Yes. Australian Security Intelligence Organisation Act 1979, No. 113 (1979) (Austl.), *amended to include anti-terrorism provisions by* Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003, No. 77 (2003), amend. 24 (Austl.) [hereinafter ASIO].
Access to Counsel	Yes. Subject to limited judicially imposed conditions to enable some interrogation.[1]
Detention Period	Detention capped at 168 hours[2] with total hours of interrogation limited to 24.[3]
Judicial Review	Yes. Judge must first authorize detention or interrogation, and such authorization must be periodically reviewed and reissued.[4] During each 24-hour period in which questioning occurs, detainee must be informed that he can seek remedy to detention and treatment in

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[1] ASIO § 34C(3B).

[2] *Id.* § 34C(4)(3)(c).

[3] *Id.* § 34HA(6),(7).

[4] *Id.* § 34C(1)-(6).

[5] *Id.* § 34DA(3).

Country	Australia
	federal court.[5]

Country	Canada
Legislative Authority	Yes. Legislative provisions embodied in criminal code: Criminal Code, R.S.C. 1985, c. C-46 §§ 83.29-83.3 (Can.), *amended by* Anti-Terrorism Act 2001, Ch. 41 (Can.).
Access to Counsel	Yes. Upon arrest or detention.[6]
Detention Period	Detainee must be brought before a judge within 24 hours, or as soon as one becomes available.[7] Detention must cease within 48 hours of that judicial hearing.[8]
Judicial Review	Yes. Judicial authorization of order to detain for the purposes of an investigative hearing;[9] detainee brought before judge upon arrest;[10] review of detention within 24 hours of arrest or as soon as judge becomes available.[11]

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[6] Criminal Code, R.S.C. 1985, ch. C-46, § 83.3.

[7] *Id.* § 83.3(6).

[8] *Id.* § 83.3(7)-(9).

[9] *Id.* § 83.28(4)(7)(9).

[10] *Id.* § 83.29(3).

[11] *Id.* § 83.3(6).

Country	France
Legislative Authority	Yes. Legislative provisions embodied in criminal code and code of criminal procedure. Most recent statute: C. PR. PÉN., arts. 63, 63-4, 706-73, 706-88 (Fr.), *last modified by* Law No. 2004-204 of Mar. 9, 2004, J.O. Mar. 10, p. 4567.
Access to Counsel	Yes. After 72 hours of detention.[12]
Detention Period	Initial detention of maximum 48 hours.[13] For alleged terrorists, the detention may be extended for two additional 24-hour periods with written authorization from a judge for a total of 96 hours.[14]
Judicial Review	Yes. Authorization of detention by a procureur within 24 hours.[15] Extensions of detention beyond 48 hours authorized by judge.[16]

[12] C. PR. PÉN. arts. 63-4, 706-88 (Fr.).

[13] *Id.* art. 63.

[14] *Id.* arts. 706-88.

[15] *Id.* art. 63.

[16] *Id.* arts. 706-88.

Country	Germany
Legislative Authority	Yes. Legislative provisions embodied in criminal code: Criminal Procedure Code §§ 112 *et seq.* StPO (F.R.G.).
Access to Counsel	Yes. Informed at time of arrest of right to counsel throughout the proceedings.[17] Right to court-appointed counsel.[18]
Detention Period	Detention without warrant: 24 hours.[19] Judge may order pre-trial investigative detention without bail.[20] Such detention may not exceed 6 months without approval by a higher court.[21]
Judicial Review	Yes. Detainee must be brought before a judge

[17] §§ 136 Nr. 1, 137 StPO (F.R.G.).

[18] *Id.* § 117 Nr. 4.

[19] *Id.* §§ 128, 135.

[20] *Id.* §§ 112, 114.

[21] *Id.* § 121.

[22] *Id.* §§ 115, 115(a).

[23] *Id.* § 117 Nr. 1.

Country	Germany
	within 24 hours.[22] Detainees have the right to challenge their detention,[23] and a right to attend and participate in that challenge.[24]

(footnote continued from previous page)
[24] *Id.* § 118a Nrs. 2-3.

Country	Israel
Legislative Authority	Yes. Emergency Powers (Detention) Law, 1979, 33 L.S.I. 89 (1978-79) (Isr.). Incarceration of Unlawful Combatants Law, 2002 (Isr.).
Access to Counsel	Yes. Under the 2002 Unlawful Combatants Law, counsel must be provided within 7 days (but no later than 7 days prior to hearing).[25] The 1979 Detention Law does not specify at what point detainee may have access to counsel, but indicates that detainee has right to counsel at all review proceedings.[26]
Detention Period	6 months, but may be renewed. Renewal requires judicial approval based on court's independent exercise of discretion. No limit on number of renewals.[27]
Judicial Review	Yes. Under the 1979 Detention Law, within 48 hours, the detainee must be brought before the

[25] Incarceration of Unlawful Combatants Law, § 6(b).

[26] Emergency Powers (Detention) Law, § 8(a) (referring to "right to counsel" during all review proceedings, although counsel may be limited to members of bar "authorized . . .to act as military defence counsel in courts martial.").

[27] Emergency Powers (Detention) Law, § 2(b); Incarceration of Unlawful Combatants Law, § 5(c).

Country	Israel
	President of the District Court to confirm, set aside, or shorten the length of detention.[28] An additional review must take place within 3 months.[29] Within 6 months, the Minister of Defense may renew the detention order or the detainee must be released. If the detention order is renewed, judicial review must occur again at 48 hours and within 3 months. The Minister of Defense may renew the detention order indefinitely.[30] The detainee can appeal to the Supreme Court.[31] Under 2002 Incarceration of Unlawful Combatants, within 14 days, the prisoner must be brought before a judge of the District Court, who may uphold or quash the detention order. Within 30 days of the District Court hearing, the detainee can appeal to Supreme Court. At 6 months, detainee must be brought before a judge of the District Court, who must order the detainee's release if he finds that such release will not harm state security. Within 30 days of the review hearing, the

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(footnote continued from previous page)

[28] Emergency Powers (Detention) Law, § 4(a).

[29] *Id.* § 5

[30] *Id.* § 2(b).

[31] *Id.* § 7(a).

[32] Incarceration of Unlawful Combatants Law, § 5.

Country	Israel
	detainee may appeal to the Supreme Court.[32]

Country	Spain
Legislative Authority	Yes. Legislative provisions embodied in criminal code: Constitución Española [C.E.] art. 17 (Spain); L.E. CRIM. arts. 384, 489, *et seq.*, *last modified by* Law on Management of the State (B.O.E., 2003, 41842).
Access to Counsel	Yes. Court appointed counsel.[33]
Detention Period	Constitutional limit of 72 hours on detention without charge,[34] which can be extended by 48 hours based on judicial discretion.[35] After charging the detainee, there is a two-year limit on detention, unless a judge grants a two-year extension.[36] No detainee may be held for more than four years without being brought to

[33] C.E. art. 17(3); *see also* L.E.CRIM. art. 384.

[34] C.E. art. 17(2).

[35] L.E. CRIM. art. 496.

[36] *Id.* art. 504.

[37] *Id.*

Country	Spain
	trial.[37]
Judicial Review	Yes. Within 120 hours, a detainee must be brought before a judge. Extensions of detention require judicial authorization.[38]

[38] C.E. art. 17(4); L.E.CRIM. arts. 496, 504.

Country	United Kingdom
Legislative Authority	Yes. Terrorism Act, 2000, c.11, ¶ 41, sched. 8 (U.K..).
Access to Counsel	Yes. As soon as "reasonably practical,"[39] and "at any time" within 48 hours.[40]
Detention Period	Initial 48 hours in detention.[41] May be extended for another five days with judicial authorization.[42]
Judicial Review	Yes. Review of detention by independent "review officer," as soon as "reasonably practical," within 48 hours. After initial 48 hours, judicial authorization of extension required.[43]

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[39] Terrorism Act, 2000, c.11, ¶ 7(1), sched. 8 (U.K.).

[40] *Id.* ¶ 7(2), sched. 8 (U.K.).

[41] *Id.* ¶ 41.

[42] *Id.* ¶ 36.

[43] *Id.* ¶¶ 29, 36.

No. 03-1027

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DONALD RUMSFELD,

Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN
as Next Friend of Jose Padilla,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF LOUIS HENKIN, HAROLD HONGJU KOH, AND MICHAEL H. POSNER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are experts in the protection of human rights under constitutional and international law.[1] They submit this brief to challenge the premise that with respect to this case, "*inter arma silent leges*" ("in wartime, the laws are silent"). The "war against terrorism" did not transform respondent Jose Padilla into an "extra-legal person," devoid of legal rights. As a U.S. citizen detained on U.S. soil, Padilla enjoys protections under United States law and international law that cannot be repealed by the President, acting alone.

Louis Henkin is University Professor Emeritus and Special Service Professor at Columbia University Law School, where he has held chairs in constitutional law and international law and diplomacy. He is currently the Chair of the Center for the Study of Human Rights and Director of the Human Rights Institute at Columbia University Law School. He has served as U.S. Member of the Human Rights Committee, Chief Reporter of the *Restatement (Third) of the Foreign Relations Law of the United States*, Co-Editor-in-Chief of the *American Journal of International Law*, and President of the American Society of International Law. His numerous publications on the subjects of constitutional law and international law include *Constitutionalism, Democracy and Foreign Affairs* (1989); *Foreign Affairs and the US Constitution* (1990); and *International Law: Politics and Values* (1995).

Harold Hongju Koh is the Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School, and Dean-Designate of Yale Law School. He

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[1] Written consent of all parties to the filing of this brief is on file with the Clerk of the Court. This brief has not been authored in whole or in part by any counsel for a party. No person, other than the *amici curiae* and their counsel, has made any monetary contribution to the preparation or submission of this brief.

served as Assistant Secretary of State for Democracy, Human Rights and Labor from 1998 to 2001. His numerous publications on the subjects of constitutional law and international law include *Deliberative Democracy and Human Rights*, with Ronald C. Slye (1999), and *The National Security Constitution* (1990).

Michael H. Posner is the Executive Director of Human Rights First (previously The Lawyers Committee for Human Rights). Since 1978, Human Rights First has been working in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law, particularly in the areas of political asylum law, international justice, refugee protection, and workers' rights. Mr. Posner has taught human rights at Yale and Columbia Law Schools and published widely on human rights.

SUMMARY OF ARGUMENT

The indefinite executive detention of U.S. citizen Jose Padilla on United States soil offends the rule of law and violates our constitutional traditions. Because we are said to be in a time of war, petitioner claims that the President has unilateral, unreviewable power to designate U.S. citizens as enemies of the state, to detain them indefinitely, and to determine their guilt without providing any of the guarantees of due process. At bottom, petitioner claims that a "war on terrorism" must necessarily be fought outside the constraints of the law. Even to invoke the rule of law, the Government suggests, is to belittle the magnitude of the threat facing our Nation.

The Government bases its actions on a radically broadened view of executive authority that is, in the

words of one judge below, "breathtaking in its sweep."[2] To accept the Government's position "would be effecting a sea change in the constitutional life of this country, and . . . would be making changes that have been unprecedented in civilized society."[3] In the Government's view, criminal charges, lawyers, and trials are neither "necessary or appropriate" when the Executive Branch decides to detain a U.S. citizen as an enemy combatant;[4] "different rules," which only the Executive may determine, "have to apply" when the threat of terrorism arises.[5]

The Government claims that those who would have this Court review its conduct toward U.S. citizens on U.S. soil "fundamentally misunderstand the nature of the threat this country is facing."[6] To ask federal judges to review the legality of a detention on a writ of habeas corpus, the Government says, is tantamount to the claim that "our judges—even though untrained in executing war plans—have a substantive role in the war decisions of the commander-in-chief."[7]

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[2] Transcript of Oral Argument in the Court of Appeals, Nov. 17, 2003, at 116:3 (Comment of Parker, J.), <http://news.findlaw.com/hdocs/docs/padilla/padrums111703trans.pdf>.

[3] *Id.* at 116:9-12.

[4] Alberto R. Gonzales, Counsel to the President, Remarks Before the American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004), <http://www.abanet.org/natsecurity/judge_gonzales.pdf>.

[5] Donald Rumsfeld, Secretary of Defense, Remarks to Greater Miami Chamber of Commerce (Feb. 13, 2004), <http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html>.

[6] Gonzales, *supra*.

[7] *Id.* The Executive would strip away the most basic due process rights of notice and an opportunity to be heard. Admiral Jacoby's chilling declaration, included in the record, claims that denying Padilla due process is essential to the Government's goal of extracting his full

(continued)

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Throughout the history of this Republic, the Judiciary has adjudicated cases under the law, and in doing so has ensured the Executive's compliance with constitutional and statutory protections. However untrained the federal judiciary may be "in executing war plans,"[8] it is fully capable of interpreting the Constitution, domestic and international law, and articulating the legal principles that restrain executive overreaching in times of security threat.

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court held that in time of undeclared war, the President lacks inherent authority to seize indefinitely the property of U.S. citizens in a manner contrary to a relevant federal statute. In this case, the court below held *a fortiori* that in time of undeclared war, the President may not invoke inherent constitutional authority to restrain indefinitely the *liberty* of U.S. citizens in a manner contrary to a relevant federal statute, the Nondetention Act of 1971, 18 U.S.C. § 4001(a).[9]

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intelligence value. Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, J.A. 80, 86 ("Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation .... Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship ... —even for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process.... Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla").

[8] Gonzales, *supra*.

[9] *Padilla v. Rumsfeld*, 352 F.3d 695, 722 (2d Cir. 2003) (citing 18 U.S.C. § 4001(a)).

The Constitution does not authorize the President to establish "different rules" to strip away the very freedoms that we espouse to the international community in the fight against terrorism. Petitioner seeks the unprecedented removal of a U.S. citizen on U.S. soil from *any* established legal regime, leaving him without the recognized rights of *either* a prisoner of war *or* a criminal defendant. This assertion of unfettered executive power lacks any support in the text and structure of the Constitution or in the precedents of this Court, and has no place in a society governed by the rule of law.

ARGUMENT

I.
THE EXECUTIVE IS CONSTRAINED BY LAW EVEN IN TIMES OF WAR.

A. The Constitution Does Not Confer Limitless Powers on the President Even in Times of War.

Ours is "a government of laws and not of men," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The Constitution establishes a Federal Government of limited, not plenary, powers. Accordingly, "Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex parte Quirin*, 317 U.S. 1, 25 (1942). By also dividing power among the three branches, the Constitution authorizes each to act as a check on the others and ensures that the conduct of each will be constrained by law. As Madison explained, "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47, at 301 (1788) (James Madison) (Clinton Rossiter ed. 1961).

The existence of war or other armed conflict does not alter the fundamental structure of the Constitution or the constraints that it imposes on executive power. The U.S. Constitution contains no wartime or emergency exception to the scope of the President's powers.[10] Indeed, the word "war" appears nowhere in Article II of the Constitution. Instead, our constitutional text, structure, and history direct that the powers to conduct war and foreign affairs are not exclusive to the Executive, but rather are shared among all three branches of Government. *See* Louis Henkin, *Foreign Affairs and the US Constitution* 25-29 (2d ed. 2002); Harold Hongju Koh, *The National Security Constitution* 69-72 (1990).

The President is given the constitutional power to act as "Commander in Chief of the Army and Navy of the United States." U.S. Const. art. II, § 2. But Congress also has far-reaching authority over matters of war and national security. The Constitution provides that Congress has the power, among others, to "declare War . . . and make Rules concerning Captures on Land and Water," to "define and punish . . . Offences against the Law of Nations," to "raise and support Armies," to "provide and maintain a Navy," and to "make rules for the Government and Regulation of the land and naval Forces"; and Congress has the power to suspend the writ of habeas corpus in times of "Rebellion or Invasion." U.S. Const. art. I, §§ 8, 9. In addition, the Constitution gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*" *Id.* art. I, § 8 (emphasis added).

[10] *Compare, e.g.*, Turkey Const. art. 15 (providing for suspension of fundamental rights, except right to life, in cases of emergency, wartime, or martial law). *See generally* Oren Gross, *Providing for the Unexpected: Constitutional Emergency Provisions*, 32 Israel Y.B. Hum. Rts. (2004), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=475583>.

The Judiciary also plays a critical role with respect to cases affecting national security and foreign affairs. Under Article III, "[t]he judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority." U.S. Const. art. III, § 2. Even for crimes directly implicating war and national security, the Constitution makes explicit that the Judiciary has a role in protecting individual liberties. *See id.* § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court"). Ultimately, "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions," not political ones. *Sterling v. Constantin*, 287 U.S. 378, 401 (1932).

To be sure, the Commander-in-Chief Clause "puts the Nation's armed forces under Presidential command." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952); *see also The Federalist* No. 69, at 418 (Alexander Hamilton) (the President's designation as commander-in-chief "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy"). No less than the President's power as chief executive in civilian matters, however, the President's power as commander-in-chief of the armed forces is limited by law; it does not make him "Commander-in-Chief of the country," *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring).

The coordinate branches traditionally give due deference to the Executive in matters of national security and foreign affairs when the President acts within the scope of his proper discretion. Such deference, however, is largely based not on constitutional text, but on the perceived institutional competencies of the Executive: speed, military expertise, and the ability to provide a unified voice for the United States in foreign affairs. *See, e.g., United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 319 (1936); Henkin, *supra*, at 41-42, 45-46; *The Federalist* No. 75, at 418 (Alexander Hamilton). Where those particular competencies are not directly implicated, and where a matter directly implicates the express powers of the coequal branches, the justification for deference to the Executive is diminished.[11]

Further, due deference must not be confused with unrestrained power, particularly in view of the specific war-related powers vested in the other branches by the very text of the Constitution. As this Court has held,

> It does not follow from the fact that the Executive has this range of discretion . . . that every sort of action . . . , no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established.

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[11] Petitioner cannot plausibly claim that the circumstances of this case invoke the unique institutional competencies of the presidency—speed, efficiency and unity—as they would be implicated, for example, by the President's control over military operations in the field. Here, the Executive has detained on U.S. soil a U.S. citizen whom the Executive declares to be an "enemy combatant," a novel term not found in international law. At the time of Padilla's designation, he was already being held in criminal detention pursuant to a material witness warrant. *Padilla v. Rumsfeld*, 352 F.3d 695, 700 (2d Cir. 2003).

Sterling, 287 U.S. at 400-01.[12]

Even in the conduct of war, the President "is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866). Indeed, the Constitution[13] and numerous federal statutes[14] contain several specific provisions designed expressly to address the balance between individual rights and public safety in times of "war," "rebellion or invasion," or "public danger."

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[12] In *Sterling*, the Court invoked established due process constraints on the power of the federal military to seize property in the course of waging war, as described in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1851), and *United States v. Russell*, 80 U.S. (13 Wall.) 623, 628 (1871).

[13] For example, Article I provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when *in Cases of Rebellion or Invasion* the public Safety may require it." U.S. Const. art. I, § 9 (emphasis added). The Third Amendment provides that "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, *nor in time of war, but in a manner to be prescribed by law*." *Id.* amend. III (emphasis added). And the Fifth Amendment requires that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger*." *Id.* amend. V (emphasis added).

[14] *See, e.g.*, Alien Enemy Act, 50 U.S.C. § 21 (declaring that "whenever there is a declared war between the United States and any foreign nation or government . . . ," citizens of "the hostile nation or government" who are not naturalized are subject to summary arrest, internment, and deportation, when the President so proclaims); Trading with the Enemy Act, 50 U.S.C. App. §§ 1-44 (enabling the President to regulate or prohibit commerce with any enemy state or its citizens after "Congress has declared . . . war or the existence of a state of war," *id.* § 2); Foreign Intelligence Surveillance Act of 1978, §§ 111, 309, 404, 50 U.S.C. §§ 1811, 1829, 1844 (permitting the President to authorize electronic surveillance, physical searches, or the use of pen registers for a period of fifteen days following a congressional declaration of war).

At a time when the Union had recently been torn apart by bloody civil war and much of the country remained under military occupation, this Court declared:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.* Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence.

Milligan, 71 U.S. (4 Wall.) at 120-21 (emphasis added). This Court should reject any attempt to read the Commander-in-Chief Clause as creating a blanket license to ignore individual rights in times of undeclared war.

B. This Court Has Recognized that the Law Applies in Times of War.

The Government misreads this Court's decisions as effectively freeing the President from any meaningful check during wartime. Time and again, in moments of national crisis, this Court has turned to law, not unfettered discretion, as the standard against which the President's action must be judged.

In *The Prize Cases*, 67 U.S. (2 Black) 635 (1863), decided at the height of the Civil War, the Court upheld the President's power to impose a naval blockade against the Confederate states. In reaching that conclusion, however, the Court nowhere suggested that the President's actions in times of war are unrestrained by law. Rather than rely on the President's assertions that a war was in

progress, the Court independently "enquire[d] whether, at the time this blockade was instituted, a state of war existed." *Id.* at 666.[15] The Court then examined whether the President was empowered to use military force, and found that power in *express congressional authorization* of a kind that is lacking here.[16] Significantly, the Court did *not* merely accept as true the Executive's representations as to the circumstances surrounding the capture of the vessels seized in the course of the blockade. Rather, the Court reviewed the executive seizure, looked to the testimony introduced below, and by applying to the facts the established international law of prize, decided to restore a portion of the seized property. *Id.* at 671-82.

While *The Prize Cases* dealt only with seized property, not with the executive detention of U.S. civilians in military custody, this Court addressed the latter issue three years later in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). The Government claimed that Milligan, like Padilla, was a U.S. citizen who had joined a subversive organization dedicated to attacking the United States.[17]

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[15] Taking guidance from customary international law, the Court reached its own conclusion that on the facts, the insurrection in the Southern states met the criteria for a civil war. *The Prize Cases*, 67 U.S. (2 Black) at 667 (quoting 3 Emmerich de Vattel, *The Law of Nations* § 293 (1758) (Joseph Chitty ed. & trans. 1852)).

[16] The Court held that the President "has no power to initiate or declare a war either against a foreign nation or a domestic State. But *by the Acts of Congress* of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or the United States." *Id.* at 668 (emphasis added) (referencing ch. 36, 1 Stat. 424, and ch. 39, 2 Stat. 443). The Court further noted that Congress had ratified the President's actions in imposing the blockade, a well-accepted form of military force under international law. *Id.* at 669-71.

[17] *See Milligan*, 71 U.S. (4 Wall.) at 6-7 (statement of the case) (reciting accusations that Milligan had joined a subversive organiz-

(continued)

There, as here, the President claimed that the existence of war and his role as commander-in-chief conferred upon him a reservoir of constitutional authority to detain citizens for trial by military commission.

In *Milligan*, unlike this case, Congress had authorized the suspension of the writ of habeas corpus, but only until the detained individual could be presented to the civilian courts for indictment and trial. The Government claimed that the President's commander-in-chief power gave him inherent authority to detain and try civilians, without regard to any limits that Congress may have placed upon that power. This Court rejected that claim, holding that the President "is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws." *Id.* at 121.

Echoing its claim here, the Government also urged this Court to defer broadly to its designation of Milligan as a prisoner to be held outside the civilian criminal system. *Id.* at 131. Rejecting any such blind deference, the Court substantively reexamined the designation the Government had placed on Milligan, concluding that Milligan was a civilian criminal defendant, accused of conspiring to wage unlawful war against the United States in concert with the enemy. *See id.* at 131 (dismissing notion that Milligan could be treated as prisoner of war). Even though Milligan's alleged crimes took place at a time when the Nation's very existence was imperiled, this Court found that the courts established by Congress were open and functioning, and that the President was thus required to

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ation "for the purpose of overthrowing the Government and duly constituted authorities of the United States; holding communication with the enemy; conspiring to seize munitions of war stored in the arsenals; to liberate prisoners of war, &c." between October 1863 and August 1864).

turn Milligan over to the those courts for trial. *Id.* at 121-22.

Nearly a century after *Milligan*, *Youngstown* again recognized that the President cannot exercise military powers to curtail liberty or seize property without express and specific authorization by Congress. President Truman had ordered the seizure of the steel mills to prevent a work stoppage that he believed could impair the conduct of the undeclared war in Korea. The Court rejected the notion—offered again by the Government today—that the changing nature of modern warfare frees the President unilaterally to extend the powers of the military into the civilian life of the Nation. Finding irrelevant the cases cited by the Government "upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war," the Court held that

> *[e]ven though 'theater of war' be an expanding concept*, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. *This is a job for the Nation's lawmakers, not for its military authorities.*

Youngstown, 343 U.S. at 587 (emphasis added).

Even this Court's discredited ruling in *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld the wholesale detention and relocation of persons of Japanese ancestry from the western United States during World War II, did not authorize the President to detain U.S. citizens indefinitely on U.S. soil without congressional authorization. In *Korematsu*, the Court upheld a criminal conviction of an American citizen of Japanese origin, who was charged with remaining in California in violation of an Act of Congress providing that no person "shall enter, remain in, leave, or commit any act in any military area

or military zone . . . contrary to the restrictions applicable to any such area or zone. . . ." *Id.* at 216. But in *Ex parte Endo*, 323 U.S. 283 (1944), decided the same day as *Korematsu*, the Court construed the same legislation as *not* authorizing the continued internment of the relocated individuals, to avoid the constitutional issue of whether such detention could ever satisfy the Due Process Clause. *Endo*, 323 U.S. at 303-04. On that basis, the Court ordered the petitioner in that case unconditionally released. *Id.*

Korematsu committed the grievous error of upholding a policy that "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting). But even there, this Court recognized limits on the President's power to curtail citizens' liberty in time of declared war. Such authority, the Court held, extended only so far as Congress had expressly authorized, and was subject to enforcement by ordinary judicial processes, not raw executive power.

Because *Milligan* and *Youngstown* cut so squarely against it, the Government rests its case almost entirely on *Ex parte Quirin*, 317 U.S. 1 (1942), which authorized the trial by military commission of German soldiers who had been captured within the United States as alleged saboteurs. Like *Korematsu*, *Quirin* is an aberrant case that was driven more by wartime haste and fear than by considered application of established constitutional principle.[18] But even accepting *Quirin* as precedent, for three

[18] Subsequent revelations indicate that Attorney General Francis Biddle urged the President to set up and conduct the secret military trials in *Quirin* less to prevent disclosure of sensitive intelligence information than to avoid the embarrassment of public scrutiny of the FBI's bungling of the case. *See* David J. Danelski, *The Saboteurs' Case*, 1 J. Sup. Ct. Hist. 61, 66-67 (1996).

reasons it offers no support for the President's current claim of unchecked wartime detention authority.

First, in *Quirin*, the Court upheld the Government's detention authority explicitly because *Congress* had authorized the establishment of military commissions by statute. *Quirin*, 317 U.S. at 29.[19] In upholding the military trials, the Court relied on *Congress's* war powers under the Constitution, *id.* at 26-28, looked to *Congress's* intent to incorporate international law in defining the scope of the war powers, *id.* at 28, and expressly declined to decide whether the President would have the power to order such trials "without the support of Congressional legislation." *Id.* at 29.

Second, in *Quirin*, members of the armed forces of Nazi Germany (according to the conceded facts), who had landed in uniform in the United States and shed their uniforms allegedly to commit sabotage, were treated as "enemy combatants" and tried before a military commission. *Id.* at 21-22. But U.S. citizens in circumstances analogous to those of respondent Padilla—who had allegedly aided the sabotage plot in the U.S. but were not themselves members of the German army—were never held as "enemy combatants." Instead, they were treated as criminal defendants under U.S. domestic law and tried in ordinary civilian courts for crimes such as treason. *See, e.g., Cramer v. United States*, 325 U.S. 1 (1945); *United*

[19] Indeed, in two other sections of the statute not quoted by the Court, Congress had specifically authorized military commissions to try the crimes with which the commission defendants were charged. *See* Act of Aug. 29, 1916, ch. 418, § 3, art. 82, 39 Stat. 619, 663 (authorizing "tri[al] by general court-martial or by a military commission"); *id.* art. 83 (authorizing "such . . . punishment as a court-martial or military commission may direct"). *See generally* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1282-83, 1285-86 (2002).

States v. Haupt, 136 F.2d 661 (7th Cir. 1943); Louis Fisher, *Nazi Saboteurs on Trial* 80-83 (2003).

Third, *Quirin* offers no support for the President's claim in this case that the Judiciary is incompetent to examine the allegations underlying the detention of an alleged enemy. The *Quirin* Court made no finding that it lacked jurisdiction to consider the lawfulness of the saboteurs' trial, that the legality of the detention was unreviewable, or that the accused saboteurs—whose status as enemy soldiers was conceded—could be detained or punished without due process. Instead, the *Quirin* Court accepted the concession that defendants were enemy soldiers, a status that Padilla contests in his case. The Court then reviewed the matter on the merits, and determined that the trial by military commission was lawful.

Similarly, in *In re Yamashita*, 327 U.S. 1 (1946), this Court upheld the war-crimes trial of a Japanese general before a U.S. military commission. As in *Quirin*, this Court found specific Congressional authorization of such a trial. *Id.* at 16. The Court analyzed the relevant international treaties to determine that the prisoner's alleged crimes fell within the jurisdiction of the military tribunal as defined by Act of Congress. *Id.* at 14-16. The majority and dissent fully agreed that, far from being unreviewable, the Court could review the legality of the trial. *See id.* at 8-9 (opinion of the Court); *id.* at 30 (Murphy, J., dissenting).[20]

[20] *Johnson v. Eisentrager*, 339 U.S. 763 (1950), is not to the contrary. The Court in that case barred nonresident enemy aliens who were imprisoned overseas and who had been tried and convicted by military commissions overseas from access to U.S. courts for habeas purposes. *Id.* at 765-66. The status of the prisoners as enemy aliens—defined as "the subject of a foreign state at war with the United States"—was not in question. *Id.* at 769 n.2. Nothing in *Eisentrager* *(continued)*

In short, this Court has never accepted a claim as extreme as the Government makes here. The Executive has no *carte blanche*, in the name of undeclared war, to remove U.S. citizens on U.S. soil from the criminal justice system and to move them, based on untested allegation, into indefinite executive detention, without counsel, unreviewed by judicial authority, and unauthorized by law.

In *amici*'s experience, the Executive's rhetoric and practice evoke not so much our own Government's historical practices as those of dictatorial foreign governments that the U.S. State Department has traditionally condemned. Historically, in Latin American countries such as Chile in the 1970s and Peru and Colombia in the 1990s, in apartheid-era South Africa, and in China, Egypt, Iraq, and Malaysia, executive officials have claimed that a war against terrorism is too important to leave to the court system. They have declared states of siege or emergency, and suspended the legal order with grievous effect on the individual rights of their own citizens.[21]

In this case, our own government is invoking an undeclared state of war to assert unreviewable discretionary

addressed the circumstances of Padilla, a U.S. citizen being detained on U.S. soil, not a "subject of a foreign state at war with the United States." *See id.*

[21] *See, e.g.*, U.S. Dep't of State, *Human Rights Report on Malaysia, 2003*, <http://www.state.gov/g/drl/rls/hrrpt/2003/27778.htm> (criticizing detention without charge or trial and interrogation without access to counsel); U.S. Dep't of State, *Human Rights Report on Egypt, 2003*, <http://www.state.gov/g/drl/rls/hrrpt/2003/27926.htm> (criticizing prolonged detention and use of military tribunals to try terror suspects); *U.S. Dep't of State, Human Rights Report on the Philippines, 2003*, <http://www.state.gov/g/drl/rls/hrrpt/2003/27786.htm> (criticizing arbitrary arrests); U.S. Dep't of State, *Human Rights Report on China, 2000*, at 743 (criticizing detention without charge); U.S. Dep't of State, *Human Rights Report on South Africa, 1985*, at 295-96 (criticizing prolonged detention of terror suspects without charge, trial, or access to courts, for preventive or interrogation purposes).

power to detain, even over U.S. citizens on U.S. soil. Such sweeping assertions cannot be reconciled with our Nation's fundamental commitment to the rule of law.

C. The Law of War, As Defined by Applicable Statutes, Treaties, and Customary Law, Imposes Limits on Detention in Times of Armed Conflict.

Petitioner invokes the phrase "law of war" as a talisman for authority to detain those it labels "enemy combatants," while ignoring the obligations imposed by the law of war. The Government's attempt to hide unfettered Presidential discretion behind the "law of war" disregards the rule of law, misrepresents this Court's holdings, ignores history, and displaces the constitutional role of Congress and the courts.

The law of war comprises international treaties relating to armed conflict—principally the Geneva Conventions[22]—and the customary rules regarding such conflicts followed by nations out of a sense of legal obligation. Whenever the law of war has previously been invoked before this Court, the Court—after considering the applicable Acts of Congress—has looked to the established body of international treaties and customary international law governing the conduct of belligerents. *See, e.g., Quirin*, 317 U.S. at 11 ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations

[22] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals"); *see also Yamashita*, 327 U.S. at 14-16; *The Prize Cases*, 67 U.S. (2 Black) at 666-68.

The Geneva Conventions apply only in "international armed conflict," *i.e.*, a difference between state parties to the applicable treaties leading to the use of military force.[23] Under the law of war, anyone belonging to the armed forces of the enemy state or an organized allied militia of those forces, or a civilian taking a *direct* part in the hostilities, may be held by the military. However, persons so detained must be afforded substantial protections and may be held only for the duration of that conflict. *See* Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. These rights include the right to be granted, in the event that their status is contested, all the protections afforded prisoners of war "until such time as their status has been determined by a competent tribunal." *Id.* art. 5. Until the present situation, the United States has officially observed these Convention protections in every conflict in which it has engaged since World War II, including the Vietnam War and the first Gulf War

[23] The instruments regulating "non-international armed conflict" (*i.e.*, conflicts that take place in the territory of a "High Contracting Party between its armed forces and dissident armed forces or other organized armed groups") do not recognize any authority to detain until the cessation of hostilities. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(1), 1125 U.N.T.S. 609. Instead, governments fighting insurgents must rely on domestic law authorizing and regulating detention. *See* Brief of *Amici Curiae* Practitioners and Specialists of the Law of War in Support of Respondent, at 16-17.

in 1991.[24] Petitioner asserts that the law of war applies to those it has labeled "enemy combatants," yet has refused to afford them the protections mandated by that body of law.[25]

The label "enemy combatant," which the Government has affixed to numerous detainees, merely describes a member of the armed forces of a country with which the United States is at war. *See Quirin*, 317 U.S. at 31. The Government's indiscriminate and novel use of that term to justify indefinite detention obfuscates the legal distinction between *privileged combatants*, such as soldiers in an army, who are entitled to protection under Article 4 of the Third Geneva Convention if captured, and *nonprivileged combatants*, who are subject to criminal punishment for their belligerent acts, such as the Nazi saboteurs in *Quirin*. *See* Third Geneva Convention, art. 4, 6 U.S.T. at 3316; *Quirin*, 317 U.S. at 31. The Government's loose usage of the "enemy combatant" label also overlooks the crucial distinction between actual *combatants* taking a *direct* part in hostilities, such as the members of the German army in *Quirin* or the Japanese general in *Yamashita*, and *civilians* who may be subject to criminal

[24] *See generally* Brief of *Amici Curiae* Experts on the Law of War, *Hamdi v. Rumsfeld*, No. 03-6696, at 9-13; U.S. Military Assistance Command, Vietnam, Directive No. 381-45, *Military Intelligence: Combined Screening of Detainees*, Annex A (Dec. 27, 1967), *reprinted in* Marco Sassoli & Antoine Bouvier, *How Does Law Protect in War?* 780-781 (1999); U.S. Army Judge Advocate General Corps, *Operational Law Handbook*, ch. 2 (T. Johnson & W. O'Brien eds. 2003), <http://www.jagcnet.army.mil/jagcnetinternet/homepages/ac/tjagsaweb.nsf/>.

[25] Nothing in the law permits the Executive to subject detainees to the burdens of the law of war without also granting them its benefits. As the Court remarked in *Milligan*, if a prisoner "cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?" 71 U.S. (4 Wall.) at 131.

trial in civilian courts for acts of espionage or treason in aid of an enemy power, such as Padilla, the *Quirin* saboteurs' co-conspirators, or the accused conspirator in *Milligan*. *Compare Yamashita*, 327 U.S. at 5, *and Quirin*, 317 U.S. at 21, *with, e.g., Cramer v. United States*, 325 U.S. 1, 3 (1945), *and Milligan*, 71 U.S. (4 Wall.) at 123.

Critically, the law of war gives the President no extra-constitutional authority to suspend—and effectively nullify—all of the constitutional limits on Executive actions against the liberty of citizens. Whenever the Government seeks to deprive a citizen of liberty, that citizen has a constitutional right to due process of law, including notice of the reasons why one is being held and an opportunity for a hearing on that issue under the criteria established by law. These constitutional protections cannot be avoided by claiming that authority to detain stems from the law of war. If, as petitioner alleges, Padilla is subject to the law of war, he must benefit from the protections that it provides as well as his constitutional rights as a U.S. citizen. *See, e.g.*, Third Geneva Convention, art. 5, 6 U.S.T. at 3316 (entitling detained alleged combatant to a hearing on his or her status before a "competent tribunal"); *see also Ex parte Endo*, 323 U.S. 283, 294-97 (1944) (ordering release of civilian held in executive detention during time of declared war).

By invoking the rhetoric of "law of war" and "enemy combatant," and resisting judicial scrutiny of the meaning and applicability of those terms, petitioner seeks to remove his prisoners from the protections of *any* recognized legal category—whether that of prisoner of war or of criminal pretrial detainee (civilian or military).[26]

[26] Precisely the same principle is at stake in the related case, *Yaser Esam Hamdi, et al. v. Donald Rumsfeld, et al.*, No. 03-6696. Two primary bodies of law afford Hamdi rights in the circumstances of his case: the U.S. Constitution and federal laws of the United States; and

(continued)

Petitioner argues that absolute executive discretion—not law—permits the indefinite incarceration of U.S. citizens on U.S. soil, without any meaningful judicial review. Such unchecked executive power over the liberty of individual citizens finds no support in our Constitution or legal tradition.

II.
THE EXECUTIVE'S DETENTION OF PADILLA IS UNLAWFUL.

Twenty-two months ago, the President abruptly declared Padilla an "enemy combatant"—a novel legal concept—and removed him from the criminal justice system. The President's action was tantamount to the summary issuance of an executive order stating:

> Notwithstanding any other provision of law, executive officials may indefinitely detain incommunicado, without charges, access to counsel, or due process of law, any American citizen stopped on U.S. soil whom they deem to be an "enemy combatant."

Apart from squarely violating the Nondetention Act of 1971, 18 U.S.C. § 4001(a), such an executive order would be at least triply unconstitutional: it would violate the constitutionally mandated separation of powers; it would unconstitutionally suspend the writ of habeas corpus without congressional action; and the total absence of

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the law of war as codified in the four Geneva Conventions, specifically the Third Geneva Convention, which relates to the treatment of prisoners of war. Yet in Hamdi's case, as in Padilla's, the Executive invokes the authority granted by both bodies of law, while accepting none of the constraints that limit the exercise of that authority. *See* Brief of *Amici Curiae* Experts on the Law of War, *Hamdi v. Rumsfeld*, No. 03-6696; Brief of *Amici Curiae* Retired Federal Judges in Support of Petitioner, et al., *Hamdi v. Rumsfeld*, No. 03-6696.

procedural protections would offend the Due Process Clause of the Fifth Amendment.

By the Government's own account, Padilla is a native-born citizen of the United States. He is alleged to have conspired abroad with al-Qaeda, a terrorist organization, to commit terrorist acts in the United States at some undisclosed time in the future. Civilian law enforcement agents arrested Padilla, on process issued by the U.S. District Court for the Southern District of New York, as he arrived in Chicago unarmed on a commercial airline flight. The Government transferred Padilla from civilian to military custody, and moved him from the district, just days before the district court was to consider his continued detention. *Padilla v. Rumsfeld*, 352 F.3d 695, 700 (2d Cir. 2003).

Nothing in these facts suggests that Padilla is a "combatant" captured in an "armed conflict," as those terms are used in the law of war. He is not alleged to be a member of the military force of a foreign country, nor was he captured in the company of foreign armed forces or while directly engaged in combat. The allegations against him are classically criminal in nature and would support a prosecution under a host of federal statutes.[27] The

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[27] *See, e.g.*, 18 U.S.C. § 831(a)(1), (8) (prohibiting conspiracy to disperse nuclear material or nuclear byproduct material in order to cause death, bodily injury, property damage, or environmental damage); *id.* § 2332a(a)(2), (b), (c)(2)(D) (prohibiting conspiracy to use weapons of mass destruction, defined to include "any weapon that is designed to release radiation or radioactivity at a level dangerous to human life"); *id.* § 2332(a)(1)-(2), (g)(1) (prohibiting conspiracy to commit "acts of terrorism transcending national boundaries," defined to include assault with a dangerous weapon where conduct occurs both inside and outside the United States); *id.* § 2332f(a)(1)-(2) (prohibiting conspiracy to bomb places of public use, government facilities, public transportation systems and infrastructure facilities); *id.* § 2339B (prohibiting conspiracy to provide material support and resources to terrorist organizations such as al-Qaeda).

Government is fully entitled to treat Padilla as an accused terrorist and criminal defendant. What it may not do is label Padilla as a "combatant" in a "war" simply to justify his sustained incommunicado detention without trial. If this were permitted, nothing would prevent the Government from doing the same to an American citizen such as Timothy McVeigh, who could be removed without explanation from the criminal justice system and honored with the label of "soldier," when in truth he was a common criminal. Far from resting on the law of war, the Government's detention of Padilla dramatically distorts that law in an effort to expand and insulate from judicial review the asserted powers of the President.[28]

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[28] In contrast, Yaser Hamdi's circumstances place him within *both* the protections of the U.S. Constitution and the Geneva Convention protections for prisoners of war. The Government alleges that Hamdi was a soldier captured on the battlefield by the Northern Alliance while fighting on behalf of the Afghan military, and then later transferred to U.S. custody. Hamdi, like any U.S. citizen who finds himself in U.S. military custody abroad, is shielded from arbitrary executive action by the U.S. Constitution. *Reid v. Covert*, 354 U.S. 1, 6 (1957) ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").

Even if Hamdi is being held under the law of war, his detention is patently illegal. The law of war, as expressed by the Third Geneva Convention, requires all detained combatants to be treated as prisoners of war "from the time they fall into the power of the enemy and until their final release and repatriation." Third Geneva Convention, art. 5, 6 U.S.T. 3316, 3322, 75 U.N.T.S. 135, 140. Such status can be revoked only if a competent tribunal holds otherwise: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories [requiring POW status], *such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.*" *Id.*, 6 U.S.T. 3316, 3324, 75 U.N.T.S. 135, 142 (emphasis added). The Government's indefinite detention of Hamdi without the protections mandated by the Third *(continued)*

Unlike the German soldiers in *Quirin* or the Japanese general in *Yamashita*, Padilla is not being tried for any crime. He is being detained without trial, formal charge, or even a status hearing. His recent meeting with counsel, which took place only after he had been detained for many months, was monitored and recorded. *See* Stevenson Swanson, *Padilla Gets to Talk with His Lawyers*, Chi. Trib., Mar. 4, 2004, at C1. In both *Quirin* and *Yamashita*, the accused were afforded more than a minimal degree of due process: they were allowed to confer with and be represented by counsel, to answer the charges against them, and to present evidence on their own behalf. *See Yamashita*, 327 U.S. at 5; *id.* at 32-33 (Murphy, J., dissenting); *Quirin*, 317 U.S. at 23. Padilla, however, has been held nearly incommunicado for almost two years without any fundamental protections. Until now, such protections have been routinely provided even to those accused of the most heinous crimes—including the enemy belligerents accused of war crimes in *Quirin* and *Yamashita* and citizens accused of acts of domestic terrorism, such as Timothy McVeigh. *See Yamashita*, 327 U.S. at 5, *Quirin*, 317 U.S. at 21; *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998). The Government makes no pretense that Padilla is being held for trial; he is simply being detained without any stated time limit for the duration of a global "war on terrorism" that has no foreseeable end.[29]

Geneva Convention flies in the face of this unambiguous and settled process. *See generally* Brief of *Amici Curiae* Experts on the Law of War, *Hamdi v. Rumsfeld*, No. 03-6696.

[29] *See* Brief for the Petitioner 28 ("all enemy combatants are subject to capture and detention for the duration of an armed conflict"); *id.* at 33 (invoking "the option to detain until the cessation of hostilities"); *see also, e.g.*, U.S. Dep't of Defense, Fact Sheet, *Guantanamo Detainees*, Feb. 2004, <http://www.defenselink.mil/news/Feb2004/d20040220det.pdf> ("The law of armed conflict governs this war between the U.S. and al Qaida and . . . permit[s] the U.S. to detain *(continued)*

Padilla's case most closely resembles that of Milligan, the pro-Confederate conspirator accused of having plotted with a secret organization to conduct attacks against the United States. Like the federal courts in Indiana at the time of *Milligan*, the U.S. District Court for the Southern District of New York continues to "m[e]et [and] peacefully transact its business. It need[s] no bayonets to protect it, and require[s] no military aid to execute its judgments." *Milligan*, 71 U.S. (4 Wall.) at 122. This Court in *Milligan* correctly rejected the claim that military necessity supported the Executive's attempt to withdraw Milligan from the civilian justice system. That controlling precedent should foreclose the Government's current effort to create an alternative justice track for Padilla.

As respondents and other *amici* have fully argued, the facts of this case fit squarely within the third category of Justice Jackson's famous concurrence in *Youngstown*. The Government has not established that either the statutory Authorization for Use of Military Force (AUMF), Pub. L. No. 107-10, 115 Stat. 224, or various appropriations provisions specifically approved executive detentions, which

enemy combatants without charges or trial for the duration of hostilities"); U.S. Dep't of Defense, Press Release No. 908-03, *DOD Announces Detainee Allowed Access To Lawyer* (Dec. 2, 2003), <http://www.defenselink.mil/releases/2003/nr20031202-0717.html> ("Under the law of war, enemy combatants may be detained until the end of hostilities"); U.S. Dep't of State, *Wolfowitz Says Jose Padilla Is "Where He Belongs,"* Wash. File, June 11, 2002, <http://usinfo.state.gov/topical/pol/terror/02061103.htm> (Padilla "is an enemy combatant who can be held for the duration of the conflict, according to Deputy Secretary of Defense Paul Wolfowitz"); Sgt. 1st Class Kathleen T. Rhem, *Intelligence, Not Prosecution, Is U.S. First Priority With Padilla* (June 2003), <http://www.defenselink.mil/news/Jun2002/n06112002_200206116.html> (quoting Secretary of Defense Rumsfeld) ("The United States is more interested in extracting intelligence information than in prosecuting Jose Padilla" and "[o]ur interest, really, in this case, is not law enforcement").

would place this matter in *Youngstown*'s first category, where the President's "authority is at its maximum." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Nor has Congress been silent, placing this matter in the "twilight zone" of *Youngstown*'s second category, where the President "and Congress may have concurrent authority or in which its distribution is uncertain." *Id.* at 637. Instead, as in *Youngstown* itself, an unambiguous statutory directive—here, the Nondetention Act's mandate that "[n]o citizen shall be . . . detained by the United States except pursuant to an act of Congress"[30]—places this case in Justice Jackson's third category, where "the President takes measures incompatible with the express . . . will of Congress, [and] his power is at its lowest ebb." *Id.* If the commander-in-chief power does not authorize the President to seize indefinitely American steel mills on American soil in times of undeclared war, how can it authorize him to seize indefinitely American *citizens* on American soil in times of undeclared war?

In *Kent v. Dulles*, 357 U.S. 116 (1958), this Court held that, even when foreign affairs are at issue, judges must find a clear statutory statement that Congress authorized the executive act in question before condoning an executive infringement on a citizen's liberty. Absent such a clear legislative statement, the Executive has no powers to withdraw rights from the individual. *See id.* at 128-30; *Ex parte Endo*, 323 U.S. 283, 299-301 (1944). Petitioner points to nothing close to a clear statement of legislative intent to authorize the military to detain United States citizens outside the law.

[30] As *amici* Congressional Sponsors of Section 4001(a) in this case point out, that statute not only reflects constitutional limits on unauthorized executive detention of American citizens, but also rebuts any claim that congressional silence could be construed as acquiescence in that practice.

The AUMF does not even mention detention authority of the kind the Executive now asserts. Indeed, in the USA PATRIOT Act, enacted less than one month after the AUMF, Congress mandated that a suspected *alien* terrorist may not be detained for more than seven days without charging the alien with a criminal offense or commencing deportation proceedings. *See* 8 U.S.C. § 1226a(a)(5) (as added by USA PATRIOT Act, Pub. L. No. 107-56, § 412, 115 Stat. 272, 351). The Act also expressly preserves the right of a detained suspected alien terrorist to seek judicial review of the merits of his or her detention by petition for a writ of habeas corpus. *Id.* § 1226a(b). The Government now asks this Court to believe that the same Congress that would not approve the detention of a suspected alien terrorist beyond a week without triggering statutory protections simultaneously and silently endorsed the indefinite detention on United States soil of United States *citizens* suspected of terrorism, based on claims of inherent presidential authority that this Court had squarely rejected in *Milligan* and *Youngstown*.

CONCLUSION

The horrific attacks of September 11, 2001 have tested this Nation's resolve. But September 11 did not suspend the Constitution, abrogate solemn treaty commitments, or repeal existing statutes. Nor did it give the President a reservoir of unreviewable power to evade domestic courts and indefinitely detain American citizens on American soil in the name of conducting undeclared wars abroad.

Even in times of war or armed conflict, ours is "a government of laws and not of men." The Constitution and the laws of the United States limit executive power and protect citizens such as Padilla from arbitrary deprivation of their liberty. If the Constitution and laws of the United States do not protect Padilla, they do not protect any of us. When the Executive exceeds the lawful boundaries of

even its wartime powers, it is the province and duty of this Court to reassert the rule of law and reaffirm the supremacy of the Constitution.

For the foregoing reasons, *amici* urge this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE RUTHERFORD INSTITUTE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND HUMAN RIGHTS FIRST (FORMERLY THE LAWYERS COMMITTEE FOR HUMAN RIGHTS) IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the district court has jurisdiction over the proper respondent to the amended habeas petition.

2. Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), to seize and detain a United States citizen in the United States based on a determination by the President that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts, or whether 18 U.S.C. § 4001(a) precludes that exercise of Presidential authority.

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INTEREST OF *AMICI CURIAE*[1]

Amici are three organizations with a range of viewpoints that have joined to address the profoundly important constitutional issues raised by this case.

Since 1978, the Human Rights First, formerly the Lawyers Committee for Human Rights, has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. Human Rights First supports human rights activists who fight for basic freedoms and peaceful change at the local level; promote fair economic practices by creating safeguards for workers' rights; protect refugees in flight from persecution and repression; work to ensure that domestic legal systems incorporate international human rights protections; and help build a strong international system of justice and accountability for the worst human rights crimes. Human Rights First believes that this case presents compelling issues of justice and the rule of law and is keenly interested in its outcome.

People For the American Way Foundation ("People For") is a non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, including Norman Lear, Father Theodore Hesburgh, and Barbara Jordan, People For now has over 600,000 members and supporters nationwide. One of People For's primary missions is to educate the public on the vital importance of our tradition of liberty and freedom, and to defend that tradition, through litigation and other means, against efforts to

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief.

limit fundamental rights and freedoms, including the fundamental rights of American citizens at issue in this case.

The Rutherford Institute ("Institute") is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have appeared as counsel before this Court and federal appeals courts in many significant civil liberties cases and have filed briefs as *amicus curiae* in numerous criminal procedure cases. Institute attorneys currently handle several hundred civil rights cases nationally at all levels of federal and state courts. The Institute has also published articles and educational materials in this area. The present case raises important criminal justice and civil liberties concerns, and so is of significance to the Institute.

SUMMARY OF ARGUMENT

Our nation has repeatedly faced perilous threats to its security and even its survival. These threats have come not only from aliens, but from citizens who, through espionage, treason, bombings, and other overt and covert acts of violence, have taken the lives of fellow citizens and threatened to destroy the nation. We therefore have a substantial historical record—from the founding of the nation, the War of 1812 and the Civil War, the Palmer raids of the 1920s, and the internment of Japanese-Americans during the Second World War—that reveals the consistent understanding that the framing generation, this Court, Congress and prior administrations have had of the President's power to detain civilians during national emergencies. The historical record demonstrates that the threat we face today, though undeniably grave, is not unprecedented. What is unprecedented is the executive branch's claim of a unilateral power to detain citizens it deems to be "enemy combatants."

In this case, the executive branch claims that the President can unilaterally determine: (1) when the nation is engaged in armed conflict, (2) what countries or organizations are the enemy, (3) whether particular United States citizens located within the United States are "enemy combatants," (4) whether those citizens should be detained and (5) for how long. According to the executive branch, the President may make these decisions without any guidance from Congress and no one—not even the detained citizen—is permitted to challenge any of his conclusions, in court or anywhere else. The President's decision to detain a United States citizen in this manner is subject to no temporal, procedural or substantive constraints. His decision is final and unreviewable.[2]

The President's assertion of unchecked power to deprive United States citizens of liberty is squarely at odds with the nation's legal history. That history demonstrates conclusively that, even in times of gravest national peril, United States citizens enjoy their liberty secure that the government cannot restrain it except according to duly enacted law. That principle was embedded in the Constitution at the nation's founding, and all three branches of government—including the executive—have enforced or respected it during crises perceived to be every bit as threatening as today's.

In structuring the Constitution, the Framers denied the executive unchecked power over matters of war and military authority. Decisions of this Court from the early days of the Republic to the Civil War and through armed conflicts in the last century have repeatedly and jealously protected the bedrock principle that, even when the survival of the nation itself is at stake, United States citizens may not be detained except according to duly enacted law. And prior administrations essentially have conceded that the President's

[2] The administration details the internal administrative procedures that were used to determine whether a citizen is an "enemy combatant." (Pet. Br. 6-7.) That procedure, however, is not required by law, and apparently could be changed at the whim of the President.

Commander-in-Chief power does not include the power to detain United States citizens without statutory authorization.

In providing such authorization, moreover, Congress must be clear. Because the most fundamental of freedoms are at stake, this Court has refused to read Congressional authorizations to use military force expansively to include the authority to detain United States citizens when civil courts remain open. This Court has consistently required the executive branch to point to legislation that specifically expresses Congress's considered view that the detention of United States citizens is warranted. And Congress has in the past spoken with such clarity. The Authorization for Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), fails this clear statement test.

The executive branch asks this Court to defer to the President on a matter of military judgment and thus permit him to continue to keep Jose Padilla in military custody. But this Court has never slavishly deferred to the executive branch, even during the Civil War, regarding whether the President has unilateral authority to restrain the liberty of citizens. To the contrary, this Court has always drawn and enforced the very line that *amici* propose: when the courts are open and functioning, a citizen in the United States cannot be detained outside the judicial process unless Congress has clearly authorized such an extraordinary act. And, when Congress has authorized such detentions in the past, it has not afforded the President the blanket power he claims here, and instead has provided various procedural rights and safeguards.

In the end, *amici* propose a resolution that is narrow, and properly so. Today is not the day to decide whether the Constitution permits the detention of citizens as "enemy combatants," or to decide what process an accused citizen "enemy combatant" is due under the Constitution. Determining whether the government can act outside the judicial process to detain its own citizens on United States soil when the courts are open and functioning is an issue this Court need

only address if both the executive and legislative branches clearly have agreed that the President must be vested with such power. Because Congress has passed no statute authorizing the detention at issue here,[3] the decision below should be affirmed.

ARGUMENT

I. THE COMMANDER-IN-CHIEF POWER DOES NOT CONFER UNCHECKED AUTHORITY TO DETAIN AMERICAN CITIZENS.

Throughout our nation's history the suggestion that the President's power as Commander in Chief includes unchecked authority, including the authority unilaterally to determine whether a citizen's liberty should be restrained, has been consistently rejected. The Founders purposefully divided the war powers between the President and Congress to ensure that the President would not have unchecked military authority. Prior administrations facing emergencies as grave as those we face today understood and respected the line the administration today proposes to cross: the executive branch may not detain citizens in the United States without Congressional authorization. Finally, this Court has consistently understood that the President's power, even in times of dire conflict, does not include the unchecked power to detain citizens, at least when the courts are available.

1. The Framers. Prior to the American Revolution, an omnipresent force in colonial life was the British Army under the sole control of the King of England. Indeed, among the list of grievances recited in the Declaration of Independence was that the King "has affected to render the Military independent of and superior to Civil power" and "has kept among us, in times of peace, Standing Armies without the Consent of our legislatures." The Declaration of Independence, paras. 13-14. As such, the Framers' fears of unchecked military

[3] *Amici* do not address whether such a statute would be constitutional.

power "are derived in a great measure from the principles and examples of our English ancestors." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1182 (1833). Having experienced first-hand the dangers of such an unchecked executive power, the Framers denied it to the executive they were creating. See James Madison, *Notes of Debates in the Federal Convention of 1787*, at 46 (Adrienne Koch ed., 1987) (the "Prerogatives of the British Monarch [were not] a proper guide in defining the Executive powers") (James Wilson).

To achieve this end, the Framers divided national military power between the executive and legislative branches. While the President was named Commander in Chief of the army and navy, Congress was also granted substantial powers over the military. In particular, Congress, among other things, was authorized to "declare War," "make Rules for the Government and Regulation of the land and naval Forces," "raise and support Armies," and "define and punish ... Offences against the Law of Nations." U.S. Const. art. I, § 8.

These provisions reflect an intent to create a substantial and independent role for Congress in military affairs. During the Constitutional Convention, it was repeatedly recognized that the new Constitution would substantially limit the potential for tyranny inherent in an armed nation. See Madison, *supra*, at 475-77, 481-83 (John Langdon, for example, responded to Elbridge Gerry's complaint that the Constitution would lead to military government by pointing out that the military would be controlled by the "Representatives of the people."). The Framers were conscious that liberty would be threatened were the President, as Commander in Chief, left with unchecked authority to employ the military power of the new nation, especially domestically. See 3 Story, *supra* § 1177 (reciting objections raised to the unlimited power of the new government to "keep large armies constantly on foot" as being "most dangerous, and in its principles despotic"). Ensuring that Congress, the branch of government most

responsive to the people, had a substantial role in controlling the use of the nation's war and military powers was understood as a vital structural protection against threats to liberty. *Id.* § 1182 (explaining that the Constitution eliminated the "danger of an undue exercise of the [military] power" by ensuring that "[i]t can never be exerted, but by the representatives of the people").

The President's assertion of unchecked authority as Commander in Chief to determine when the nation is at war, with whom, which of the nation's citizens are "enemy combatants," and which of those combatants should be detained by the military is flatly at odds with the Framers' clear intent to *limit* the President's military power, especially on United States soil. Having taken such care to subject the President's military powers to Congressional control, the Framers did not intend the phrase "Commander in Chief" to provide the President with unchecked power to use the military to detain citizens in the United States when civilian authorities remain available to enforce the rule of law.

Indeed, the founding generation's distrust of standing armies and its narrow conception of the President's Commander-in-Chief power is reflected in its response to the "undeclared war" with France, the first major threat to the nation's security. France, then a world superpower, had large "numbers of enemy agents operating in th[is] country" and had for years enjoyed the ardent support of many United States citizens. David McCullough, *John Adams* 505 (2001). Operating in a climate of "rampant fear of the enemy within," *id.*, and amidst rumors that French agents were plotting to burn down Philadelphia (the nation's capital and largest city), *id.* at 501, Congress enacted a series of war measures. Notably, however, while the Alien Act gave the President broad authority to expel foreigners he deemed dangerous, the infamous Sedition Act authorized only criminal prosecutions against citizens who conspired to take actions against the United States. An Act respecting Alien Enemies, ch. 66, § 1,

1 Stat. 577, 577 (1798); An act for the punishment of certain crimes against the United States, ch. 74, 1 Stat. 596 (1798).

Even the threat of war with Napoleon did not shake the founding generation's distrust of standing armies. President Adams himself "deplored the idea of a standing army," and Congress raised only a "'provisional'" one to repel a possible invasion. McCullough, *supra*, at 499. When the threat of war receded, Adams and Congress competed in seeking credit for promptly disbanding that provisional force. *Id.* at 540.

Thus, the founding generation's attitudes and actions, even at a time of grave peril to a still weak nation, belie any suggestion that they understood the Commander-in-Chief Clause to confer a sweeping unilateral authority on the President to arrest and detain United States citizens.

2. The War of 1812. Two administrations later, the nation found itself at war with Britain, then the world's greatest naval power. It is easy to forget, nearly two centuries and a number of large-scale wars later, what peril the nation faced at the time. British forces invaded the United States, sacked Washington and, in much the same way as today's enemies, destroyed national symbols, burning and gutting the White House and the Capitol. Due to the deep political divisions of the day, moreover, many Federalists in New England obstructed war efforts, and President Madison feared extremists there were plotting to secede, a possibility the British promoted by blockading all but northern ports. Jack N. Rakove, *James Madison and the Creation of the American Republic* 196, 200-01 (2002).

Despite citizen-led obstructions of the war effort, Congress did not authorize military detentions of citizens. And, in several decisions that this Court later deemed notable "not only for the principles they determine, but on account of the distinguished jurists" involved, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 129 (1866), courts deemed several such detentions unlawful. In *Smith* v. *Shaw*, 12 Johns. 257 (N.Y. Sup. Ct. 1815), New York's highest court held that an American citizen believed to be a British spy was falsely imprisoned by a military commander who detained him for two weeks. Because no act of Congress authorized the plaintiff's trial, "the defendant could certainly have no legal right to detain him." *Id.* at 266. To the defendant's assertion that the plaintiff's detention was "essential to the public safety," *id.* at 260, the court responded that "[i]f the defendant was justifiable in doing what he did, every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority." *Id.* at 266; see also *In re Stacy*, 10 Johns. 328, 333 (N.Y. Sup. Ct. 1813) (holding that detention of citizen by military official was without "any color of authority"); *McConnell* v. *Hampton*, 12 Johns. 234 (N.Y. Sup. Ct. 1815) (upholding false imprisonment verdict against military officer who detained citizen suspected of espionage, but ordering new trial on damages).

3. The Civil War. In the midst of the gravest threat to the survival of the Union our nation has ever faced, this Court flatly rejected the broad interpretation of the Commander-in-Chief power that the executive branch presses in this case.

During the Civil War, Lamdin P. Milligan was a member of "a secret society known as the Order of American Knights or Sons of Liberty, for the purpose of overthrowing the Government; ... [held] communication with the enemy; conspir[ed] to seize munitions of war stored in the arsenals; [and] to liberate prisoners of war." *Ex parte Milligan*, 71 U.S. (4 Wall.) at 6-7. In October 1864, Milligan was arrested by military personnel, tried by military commission, and sentenced to death. *Id.* He filed a petition for writ of habeas corpus, insisting upon his right to be released because the military lacked authority to detain a citizen arrested in Indiana, which had never been in rebellion. *Id.* at 108.

The arrest of Milligan had taken place after Congress had authorized the President to suspend the writ of habeas corpus in 1863, An Act relating to Habeas Corpus, ch. 81, 12 Stat.

755 (1863) (the "1863 Act"). But Milligan was still able to obtain judicial review, because the military had failed to observe the procedural dictates of the 1863 Act.[4] *Milligan*, 71 U.S. (4 Wall.) at 114-16. As a result, the government was forced to defend the lawfulness of Milligan's detention and trial, without the benefit of the 1863 Act.

The government asserted that military jurisdiction over Milligan was "complete under the 'laws and usages of war.'" *Id.* at 121. Specifically, the government argued that the nature of the Civil War, which placed Indiana (Milligan's state) under threat of invasion by the enemy, furnished the military with the authority to seize citizens who were aiding the enemy. *Id.* at 126. This Court flatly rejected the argument. In doing so, the Court drew a clear line: "Martial rule can never exist where the courts are open." *Id.* at 127; see also *id.* at 121 (rejecting application of laws of war "in states which have upheld the authority of the government, and where the courts are open and their process unobstructed"). This Court did not question the authority of the President or his military commander to impose rules "on states in rebellion to cripple their resources and quell [an] insurrection." *Id.* at 126. But this Court would not cede to the President, and his military officers, the type of unchecked authority over the liberty of citizens that the executive branch asserts here. The framers "knew ... the nation they were founding ... would be involved in war ... and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen." *Id.* at 125.[5]

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[4] The significance of those procedural requirements is discussed in more detail *infra* at 23-28.

[5] *Milligan* affirmed the views of other state and federal courts that the President's power as Commander in Chief does not include the authority to suspend the writ of habeas corpus without Congressional authorization. *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (Taney, J.) (holding that Congress alone possesses the power to suspend the writ of habeas corpus); *In re Kemp*, 16 Wis. 359, 367-68 (1863)

The executive branch here seeks precisely the authority the Lincoln Administration was denied. It asserts that the nature of the war with al Qaeda requires military authority to detain United States citizens, despite the fact that civil courts remain open. Pet. Br. 35-38. During the Civil War itself, however, the very survival of the nation was at stake, and the organizations to which Milligan belonged had stockpiled weapons, conspired with rebel agents to plot insurrections against the government, and "coordinated an invasion of Missouri with guerrilla attacks." James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 783-84 (1988). Other saboteurs received $5 million from the Confederate government and used it to destroy or damage military installations in Missouri and Illinois and hotels in New York City. *Id.* at 764. Yet, despite these terrorist-like activities in aid of a full-scale military rebellion, the courts refused to acquiesce in the President's assertion of unchecked power over the liberty of citizens.

4. Twentieth Century Responses to National Crises. No doubt influenced by Civil War-era precedents, the executive branch responded to several national emergencies during the twentieth century by seeking statutory authority to detain American citizens. These actions reflect the recognition of prior administrations that they lacked such authority in the absence of Congressional authorization.

A. The Palmer Raids. In April 1919, mail bombs were sent to nearly 20 government officials and business leaders. On May 1, 1919, riots broke out during May Day celebrations in Cleveland, Boston and New York. On June 2, 1919, bombs

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(holding that only the legislature may suspend the writ of habeas corpus and denying that the Commander-in-Chief power authorized the President to institute martial law in those jurisdictions where courts remained open); *Griffin* v. *Wilcox*, 21 Ind. 370, 386 (1863) (holding that the President "has the right to govern, through his military officers, by martial law, when and where the civil power of the United States is suspended by force[, but that i]n all other times and places, the civil excludes martial law—excludes government by the war power") (emphasis omitted).

exploded in eight different cities within the same hour, apparently targeting government officials including Attorney General A. Mitchell Palmer.[6] Because pamphlets from "The Anarchist Fighters" were found in the rubble of the bomb sites, the Justice Department concluded that the bombings were the work of Communists. Although the bombers were never captured, the Justice Department launched a series of raids that detained over 3000 radical aliens and deported many of them based on their membership, or suspected membership, in Communist organizations. See Espionage Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012 (repealed 1952) (authorizing deportation on such grounds).

The Attorney General believed that some citizens might also pose a serious threat to the peace and security of the nation. See *Sedition: Hearing Before the House Comm. on the Judiciary*, 66th Cong. 6 (1920) (statement of Attorney General Palmer) ("There is a condition of revolutionary intent in this country, on the part of both aliens and citizens ... manifested chiefly by the threats, both written and spoken, on the part of such persons to injure, destroy or overthrow the Government by physical force of violence."). He recognized, however, that no law authorized him to detain citizens for the same offenses for which aliens were being deported. *Charges Against the Dep't of Justice: Hearings Before the House Comm. on Rules*, 66th Cong. 29, 33 (1920) ("1920 Hearings"). Notably, the Wilson Administration did not declare the threat from anarchists and communists to be akin to war, and order the military to detain citizens believed to be enemy combatants. Instead, President Wilson requested that Congress "arm the Federal Government with power to deal in its criminal courts with those persons who by violent methods would abrogate our time-tested institutions." Woodrow Wilson, Seventh Annual Message to Congress (Dec. 2, 1919),

[6] A more complete description of these facts may be found in David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* 117-19 (2003).

available at http://www.presidency.ucsb.edu/site/docs/doc_sou.php?admin=28&doc=7 (last visited Apr. 8, 2004); see also 1920 Hearings at 33 (urging Congress to pass a statute that would authorize detention of citizens without proof of a conspiracy).

B. The Japanese Internment. Likewise, during the infamous World War II Japanese internment, the Roosevelt Administration recognized that it did not possess a unilateral detention power. On February 19, 1942, President Roosevelt issued Executive Order 9066, which authorized an appropriate military commander to create exclusion zones from which any individual could be excluded at the commander's discretion. 7 Fed. Reg. 1407. Pursuant to that order, the military issued orders excluding "all persons of Japanese ancestry, both alien and non-alien" from certain areas on the west coast. See, *e.g.*, Civilian Exclusion Order No. 57, 7 Fed. Reg. 3725, 3725 (May 10, 1942).

In the wake of the devastating attack on Pearl Harbor, the West Coast of the United States was widely perceived as under threat of imminent attack. See Public Proclamation No. 1, 7 Fed. Reg. 2320, 2321 (Mar. 2, 1942) (reciting that the entire Pacific Coast "by its geographical location is particularly subject to attack [and] invasion"). Executive Order 9066 itself plainly expressed the President's view that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities." 7 Fed. Reg. at 1407. Yet, despite dangers perceived to be just as dire as those the nation faces today, the military did not assert that anyone refusing to comply with orders issued to protect the homeland posed an unacceptable danger to national security warranting his or her detention by the military.

To the contrary, the War Department recognized that it could not exercise an inherent military arrest power to enforce compliance with its duly issued order. It explained to

Congress that, "'[a]s things now stand orders can be issued but there is no penalty provided for violation of orders and restrictions so issued.... [P]assage of this bill was necessary ... to properly carry out the provision of the Executive order.'" 88 Cong. Rec. 2724 (1942). Rather than assert the unilateral authority to enforce its own orders, the military asked Congress to provide for criminal punishment of violators, see *id.* at 2722, which Congress quickly provided. See Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (repealed 1948).

C. The Steel Seizures. Although President Truman's seizure of the nation's steel mills during the Korean War did not involve the detention of citizens, it is also instructive here because of the core separation of powers principles that should inform the Court's judgment about how to proceed in this case. Both the courts (in the Civil War-era cases) and the executive branch (in the Palmer raids and internment situations) recognized that, if the national government can authorize the detention of citizens, that power resides in the political branches *as a whole*. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587 (1952), this Court expressly rejected the assertion that military exigencies enable the President, in his capacity as Commander in Chief, to arrogate to himself authority that resides in the legislative branch.

Believing that a threatened strike against most of the nation's steel mills would "immediately jeopardize and imperil our national defense ... and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field," President Truman, acting "as President of the United States and *Commander in Chief of the armed forces of the United States*," ordered the mills seized and new labor agreements enacted. Exec. Order No. 10340, 17 Fed. Reg. 3139, 3141 (Apr. 10, 1952) (emphasis added). This Court held that a Commander-in-Chief power to seize private property could not be squared with our constitutional system, for such power "is a job for the Nation's lawmakers, not for its military authorities." *Youngstown*, 343 U.S. at

587.[7] "The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control," because "[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." *Id.* at 588-89. Because the continued production of steel could have been ensured through legislative means—by eminent domain, labor laws, or other legislative enactments—the Commander-in-Chief power did not authorize the President to obtain that same result by fiat. *Id.* at 588.

* * *

The lessons of this history are clear. The Constitution requires that Congress, and not merely the President alone, determine how to deal with American citizens accused of conspiring with an enemy to commit war-like acts on American soil. Congress has not authorized the military detention of such individuals, and has instead relied upon the comprehensive system of criminal laws to deal with such cases.[8] Because this is a decision that must reflect a

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[7] The administration seeks to distinguish *Youngstown* on the ground that President Truman used civilian rather than military forces to carry out his order. Pet. Br. 36. But nothing in this Court's decision suggests the outcome would have been different had the President ordered the military to take over the mills for the purpose, "quintessentially *military*," *id.*, of securing military supplies during time of war.

[8] *See, e.g.*, 18 U.S.C. § 2339b (criminalizing conspiracy to provide material support and resources to terrorist organizations such as al-Qaeda); *id.* § 2384 (criminalizing seditious conspiracy, including conspiracy to levy war against the United States); *id.* § 2381 (criminalizing treason); *id.* § 2332b (criminalizing acts of terrorism transcending national boundaries); 50 U.S.C. § 1705(b) (criminalizing conspiracy to contribute services to terrorist organizations such as al-Qaeda); 18 U.S.C. § 924(c) (criminalizing use of destructive device during and in relation to crime of violence); *id.* § 924(c)(1)(A)(iii) (criminalizing possession of firearms in furtherance of crimes of violence); *id.* § 2332a(a)(1) (criminalizing attempted use of a weapon of mass destruction); *id.* § 844 (criminalizing certain manufacture and handling of explosive materials); *id.* § 371 (criminalizing conspiracy to commit offense against United States).

legislative and not merely an executive judgment, the President, even acting as Commander in Chief, cannot proceed unilaterally.

II. CONGRESS MUST CLEARLY AUTHORIZE ANY DETENTION OF AMERICAN CITIZENS WITHIN THE UNITED STATES.

The administration asserts that Congress has authorized the President to detain, indefinitely, any citizens in the United States whom he deems "closely associated with al Qaeda" and whom he believes has "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism." Pet. Br. App. 5a. The President asserts that Congress took this dramatic step and provided him with extraordinary discretion to detain citizens in the United States with the following words:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

AUMF, § 2, 115 Stat. at 224.

This language cannot bear the heavy weight the President places upon it. This Court has, since the early days of the Republic, consistently refused to read broadly worded, non-specific grants of authorization to use military force as including a general detention power like that asserted here. Indeed, the non-specific authorization to use force reflected in the AUMF has often been read narrowly. This Court has refused to allow "traditional forms of fair procedure [to be restricted] by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." *Greene* v. *McElroy*, 360 U.S. 474, 508 (1959); *Ex Parte Endo*, 323 U.S. 283, 300 (1944) (stating "[w]e must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used").

Congress has, on occasion, purported to authorize preventive detentions in terms far more "unmistakable" than that used in the AUMF. And, as explained more fully below, those examples are instructive because they show that a clear statement rule encourages Congress to express its considered view regarding precisely what procedural protections are due under the circumstances. *Greene*, 360 U.S. at 507 ("[E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws."). Whether Congress might one day choose to present the President the kind of authority he claims here cannot be known. But what is clear is that Congress has never done so when it has squarely considered the question.

1. The Limited Reading of Prior Authorizations to Use Force. In declaring war against Great Britain on June 18, 1812, Congress provided that "the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper ... against the vessels, goods, and effects of [Great Britain] and the subjects thereof." Ch. 102, 2 Stat. 755, 755 (1812). In *Brown* v. *United States*, 12 U.S. (8 Cranch) 110 (1814), the United States Attorney for the District of Massachusetts had argued that the authorization to use force in the declaration of war also authorized the seizure of 550 tons of timber transported by a ship chartered to a British company. This Court rejected that argument. *Id.* at 125-26.

This Court's opinion highlighted the fact that after declaring war against Britain, Congress subsequently enacted separate legislation empowering the President to deal with alien enemies and to keep prisoners of war. *Id.*; see also An Act for the safekeeping and accomodation of prisioners of war, ch. 128, 2 Stat. 777, 777 (1812) (granting the President power to "make such regulations and arrangements for the safe keeping, support, and exchange of prisoners of war as he may deem expedient"). This meant that the declaration of war, standing alone, had not authorized the President to detain enemy citizens. Since "[w]ar gives an equal right over persons and property," it follows that the declaration of war, standing alone, did not authorize the President detain enemy property either. *Brown*, 12 U.S. (8 Cranch) at 126.

If, as *Brown* holds, a general declaration of war, and the accompanying general authorization to use force, failed to authorize the detention of either enemy citizens or property, *a fortiori*, it failed to authorize the military detention of United States citizens believed to have aligned themselves with the enemy. Indeed, that is precisely the holding of the notable decisions, discussed above, in which state courts upheld damages awards against military officers who detained citizens during the War of 1812. See *supra* at 8-9.

The same principle was applied during World War II. The declaration of war against Japan provided that "the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States." Declaration of War with Japan, Dec. 8, 1941, ch. 561, 55 Stat. 795, 795. During the war, the government asserted the power to detain United States citizens in two distinct contexts: martial law in Hawaii, and the internment of Japanese Americans in the western United States. Yet despite the

authorization to use *all* available resources to defeat Japan, the government never suggested that the broad authorization to use force supported either of these assertions of a detention power.

When instituting martial law in Hawaii, the government relied upon Section 67 of the Organic Act, passed by Congress in 1900 to create a territorial government for Hawaii. It provided as follows:

> That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, ... and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, *suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under marital law* until communication can be had with the President and his decision thereon made known.

Act of Apr. 30, 1900, ch. 339, § 67, 31 Stat. 141, 153 (eliminated 1959) (emphasis added).

Within hours of the Japanese attack on Pearl Harbor, the territorial governor of Hawaii issued a proclamation placing Hawaii under martial law and suspending the writ of habeas corpus. The proclamation authorized the Hawaiian Department of the United States Army to exercise all "the powers normally exercised by [the] Governor [and] judicial officers and employees," and such other powers as required "until the danger of invasion is removed." Garner Anthony, *Martial Law in Hawaii*, 30 Cal. L. Rev. 371, 393 (1942) (reprinting proclamation). President Roosevelt approved this decision. *Id.* at 372. Military courts supplanted civilian courts as the sole criminal authority in Hawaii for nearly three years. Nearly all basic constitutional guarantees were disregarded. See Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawaii, 1941-1946*, 19 U. Haw. L. Rev. 477, 512 (1997); see

also J. Garner Anthony, *Hawaii Under Army Rule* 38-39 (1955) (discussing procedures employed during military trials in Hawaii). Moreover, at least 1,500 individuals, including 617 American citizens, were detained indefinitely on suspicion of disloyalty. See Scheiber, *supra*, at 491; Memorandum from Office of Internal Security (Honolulu) to War Department No. R73740 (Nov. 30, 1945) (on file in the Hawaii Military Government Records, Record Group 338, National Archives).

Although none of the 1500 detainees filed habeas petitions,[9] in *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946), this Court was presented with petitions for habeas corpus from two individuals convicted by the military courts for embezzlement and assault. This Court concluded that even the Organic Act's specific authorization to impose "martial law" did not authorize the government to displace the civilian courts. This Court first recognized that the Organic Act "certainly did not explicitly declare that the Governor in conjunction with the military could for days, months or years close all the courts and supplant them with military tribunals." *Id.* at 315. The Court then reviewed the meaning of "martial law" in the history of American law and determined that its historic usage typically contemplated coexistence with civilian courts, where possible. *Id.* at 319-24. Therefore, this Court held, a Congressional authorization to place Hawaii under "martial law" did not also indirectly authorize trying civilians in military tribunals, for Congress "did not wish to exceed the boundaries between military and civilian power, in which our people have always believed." *Id.* at 324. If an express authority to impose "martial law" is not sufficient to displace civil courts, then the "clear statement" requirement is obviously a significant protection against unilateral executive branch efforts to detain citizens without judicial safeguards.

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[9] This failure reflected the detainees' fear that such an action could subject their fellow Japanese-Americans on Hawaii to the same mass detentions then occurring on the mainland. *See* Scheiber, *supra*, at 580.

The military internment orders applied against Japanese Americans in World War II provide yet another example of the high degree of clarity required before statutes will be understood to authorize military detention. As noted above, Congress, by the Act of March 21, 1942, ch. 191, 56 Stat. 173 (repealed 1948), provided legislative backing for Executive Order 9066. In *Endo* this Court held that that legislation did not clearly enough authorize the military detention of citizens.

Endo, a Japanese-American citizen who refused to accept the lawfulness of her detention, filed for a writ of habeas corpus. The Court examined the Act of March 21, 1942, in light of the Constitution's strong protections of liberty, and assumed that even a war-time measure is intended "to allow for the greatest possible accommodation between ... libert[y] and the exigencies of war." 323 U.S. at 300. The Court then noted that neither the Act nor its legislative history "use[s] the language of detention." *Id.* In the absence of any express authority to detain, this Court refused to imply it. *Id.* at 300-04.

In both *Endo* and *Duncan*, therefore, this Court applied a strong presumption that military authorizations do not permit military detentions of citizens on United States soil, or the trial of such citizens in military courts, unless Congress clearly manifests an intent to confer such an extraordinary power. Although neither case involved persons alleged to be enemy belligerents, the applicability of the presumption this Court employed does not depend on this fact. If it did, a presumption *against* implied delegations of authority to detain citizens would be transormed into a presumption in *favor* of such authority by the expedient of an administration's unchallengeable allegation that a citizen is an enemy combatant. According to the administration, the President can detain a citizen without opportunity to prove his loyalty because the citizen has not proven his loyalty. Nothing in *Endo* or *Duncan* suggests that an interpretive presumption employed

to protect the most fundamental of rights can be so easily evaded.

Nor does it matter that Endo's custodian was a civilian agency, whereas Padilla is in military custody. Pet. Br. 46. The War Relocation Authority established by President Roosevelt was specifically empowered to carry out the orders of the Secretary of War or other military commanders. *Endo*, 323 U.S. at 287. While the War Relocation Authority was nominally civilian, its entire function was to assist the Commander in Chief in his military role and to enforce orders issued by military commanders. Executive Order 9066 made clear that the actions being taken were matters of national security. *Supra*, at 13. Were the President to create a civilian "Enemy Combatant Detention Authority" to detain Padilla, his power of detention could hardly expand as a result.

In the end, the AUMF is simply too vague to meet the standards of *Brown*, *Duncan* and *Endo*.[10] The authorization to use "all necessary and appropriate force" makes no statement one way or the other on whether it authorizes the detention of American citizens in places where courts are open to enforce the law. It is, if anything, less sweeping than the authorization "to use the whole land and naval force of the United States to carry the [war with Great Britain] into effect" during the War of 1812, ch. 102, 2 Stat. at 755, or "to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against [Japan and] Germany; and, to bring the conflict to a

[10] The administration also half-heartedly argues that the Congressional statute that funds detention of prisoners of war, among others, authorizes the detention of Padilla. Pet Br. 39 (citing 10 U.S.C. § 956(5)). This argument was squarely rejected in *Endo*, where the government had argued that the detention power was ratified by Congressional funding for the Authority *after* the Authority promulgated its rules requiring relocated citizens to seek permission to leave. This Court recognized that Congress may fund a program without specifically ratifying every executive assertion of authority under the program. 323 U.S. at 303 n.24.

successful termination," Declaration of War with Germany, Dec. 11, 1941, ch. 564, 55 Stat. 796, 796, during World War II. These declarations of war were insufficient to authorize detention of American citizens. So is the AUMF.

2. Congress's Express Efforts To Authorize Detention of Citizens. The AUMF is not only substantially similar to statutes that have been held *not* to delegate a military detention power over citizens to the executive branch. It also stands in noticeable contrast to statutes that *have* clearly purported to delegate such a power to the President. Certain statutes stand out in American history for the clarity with which they appear to support an executive branch assertion of authority to detain citizens. And in those statutes, Congress not only expressly purported to authorize such detentions, it also expressly prescribed the procedural rights of the citizen to challenge that detention as erroneous or abusive.

First, in 1863 Congress passed a law authorizing the President to suspend the writ of habeas corpus. 1863 Act, § 1, 12 Stat. at 755. Suspension of the writ effectively authorizes detention outside the judicial process, because the courts would lack jurisdiction to hear any claim from the detained citizen. But the 1863 Act just as clearly provided specific procedural protections for citizens detained by the President, including protections that were tied to the judicial process.

The Secretaries of State and War were to provide a list of citizens imprisoned by presidential authority to courts in states where the administration of the laws remained unimpaired. *Id.* § 2, 12 Stat. at 755-56. Thereafter, any citizen so detained was to be released (and the officer in charge of the detention indicted for failure to do so) if the appropriate grand jury terminated its session without indicting the detainee. *Id.* That release, however, was to be conditioned upon an oath of loyalty to the United States and, if necessary, the posting of a bond to ensure good behavior. *Id.* § 3, 12 Stat. at 756. Moreover, even if the detainee were

indicted, he was entitled to be released upon posting any bail that was generally applicable to the charge. *Id.*

Although the 1863 Act allowed the President to detain a citizen without charge, it cabined that authority in time, thus preserving the fundamental rule-of-law values that form the basis of American freedom. As the *Milligan* Court noted, Congress had not "contemplated that such person should be detained in custody beyond a certain fixed period, *unless certain judicial proceedings, known to the common law, were commenced against him.*" 71 U.S. (4 Wall.) at 115 (emphasis added). Because Congress was consulted regarding the proper treatment of citizens who were militarily detained, Congress was able to provide expressly what this Court has recognized Congress always seeks to provide when enacting war-related legislation: "the greatest possible accommodation between ... liberties and the exigencies of war." *Endo*, 323 U.S. at 300.[11]

The second example of congressional authorization to detain American citizens likewise included certain procedural protections for those detained. In 1950, amid increasing fears of Communist subversion and infiltration, Congress passed the Emergency Detention Act ("EDA") over a presidential veto. Ch. 1024, tit. II, 64 Stat. 1019 (1950) (codified at 50

[11] This Court expressed approval for Congress's balance over the administration's assertion of unchecked authority:

> If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, and afforded aid and comfort to rebels, and incited the people to insurrection,' the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law ... enforced, and the securities for personal liberty preserved and defended.

Milligan, 71 U.S. (4 Wall.) at 122.

U.S.C. §§ 811-826 (1970)) (repealed 1971).[12] In passing the Act under the shadow of the Internment of Japanese Americans, Congress saw fit to "provide protection and safeguards to persons apprehended or detained under this title which are markedly greater than those accorded to persons whose relocation was ordered during World War II pursuant to legislation then in effect." H.R. Conf. Rep. No. 81-3112, at 65 (1950).

The powers of the Emergency Detention Act were to be triggered by presidential proclamation of an emergency during times of war, invasion, or insurrection, and those powers would last until terminated by either the President or Congress. 50 U.S.C. § 812(a)-(b) (1970) (repealed 1971). During a declared emergency, the Attorney General could "apprehend and by order detain ... each person as to whom there is reasonable ground to believe ... probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage." *Id.* § 813(a). Within 48 hours, a detainee was to appear before a preliminary hearing officer who was to inform him of various rights, including the grounds for the detention, the right to remain silent, the right to counsel, and the right to a preliminary hearing. *Id.* § 814(d). At the preliminary hearing, the detainee could introduce evidence and cross-examine witnesses; following that hearing the hearing officer could order continued detention or release. *Id.* Were continued detention ordered, the detainee could appeal to a review board required to hear the appeal within 45 days. *Id.* § 819(b). Judicial review of the detention was available either through appeal from

[12] The Emergency Detention Act was repealed by passage of 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The full implications of § 4001(a) for this case are addressed by other *amici*. For present purposes, this statute reflects Congress' recognition of its own constitutional obligation to shoulder responsibility—through clear statements and careful consideration of procedural safeguards—for any such extraordinary detentions.

decisions of the review board or through the writ of habeas corpus. *Id.* §§ 813(b)(4), 821.

Even when considering what kind of detention power to provide the President when investigating aliens suspected of terrorist activities, Congress has provided more procedural protections than the administration would provide an American citizen like Padilla. Though the administration initially asked Congress for the power to detain aliens suspected of terrorist ties indefinitely, 147 Cong. Rec. S11,004 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy), Congress refused. Instead, under section 412 of the Patriot Act, the Attorney General may detain aliens involved in terrorist activity or otherwise "engaged in any ... activity that endangers the national security of the United States," but must either begin removal proceedings or charge the alien criminally "not later than 7 days after the commencement of such detention." 8 U.S.C. § 1226a(a)(3)-(5). Congress provided that, even when detention is allowed, the Attorney General must review its necessity every six months, and the detainee is permitted to present evidence on his behalf. *Id.* § 1226a(a)(6)-(7). Judicial review of the detention remains available at all times. *Id.* § 1226a(b). If the administration is right, then Congress has provided greater procedural protections for aliens accused of working for al Qaeda than for United States citizens. There is no evidence for such a counter-intuitive proposition.[13]

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[13] Padilla was originally detained as a material witness in a terrorism investigation. The statute authorizing such detentions—another example of Congressional authorization to detain citizens without charge—provides substantial procedural protections. These protections, which are the same as those provided to defendants detained prior to trial, 18 U.S.C. § 3144, include a hearing in which the government must show by clear and convincing evidence that no procedures other than detention are sufficient to ensure future court appearances. *Id.* § 3142(f). The hearing must be held no later than five days after the detainee's first court appearance, and the detainee is entitled to be represented by counsel, to testify, and to present and cross-examine witnesses. *Id.*

Even the administration's principal case fits within the legal framework advanced by *amici*. *Ex parte Quirin*, 317 U.S. 1 (1942), is not, as the administration would have it, a case in which a citizen in the United States was detained solely on the President's authority, without Congressional authorization. To the contrary, Congress had specifically authorized military detention and trial. As this Court pointed out, Congress, in Article 12 of the Articles of War, had provided the military with broad authority to try "'*any* ... *person* who by the law of war is subject to trial by military tribunal[].'" *Id.* at 27 (emphasis added). The emphasized language had been passed in 1916 to expand the authority of courts-martial to try civilian United States citizens. Maj. Jan E. Aldykiewicz & Maj. Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 Mil. L. Rev. 74, 92-96 (2001).[14] At the same time, Congress passed Article 15, Articles of War, ch. 418, sec. 3, § 1342, art. 15, 39 Stat. 650, 653 (1916), which made clear that the creation of courts-martial jurisdiction did not affect the jurisdiction of military commissions. S. Rep. No. 64-130, at 40 n.20 (1916).

Just as important, the Articles of War passed by Congress that authorized the military to detain citizens who were believed to be enemy combatants included procedural protections for the accused. Most prominently, suspected enemy combatants detained pursuant to the Articles of War were guaranteed the right to a trial at which they could mount a defense. *In re Yamashita*, 327 U.S. 1, 9 (1946).[15] And

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[14] Notably, neither the Court nor the government in *Quirin* appears to have relied upon the broad declaration of war with Germany as authority for the detention and trial of Haupt, the citizen enemy combatant. *See* Declaration of War with Germany, ch. 564, 55 Stat. at 796.

[15] It is perhaps because of the requirement that the detained be tried that the administration does not seriously assert that Padilla's detention is authorized by the surviving version of the Articles of War (now the

Congress made clear its preference that such a trial should be conducted, when "practicable," according to the "the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States." Articles of War, ch. 227, ch. II, art. 38, 41 Stat. 787, 794 (1920).[16]

At such a trial, the accused would have the opportunity, should he desire it, to dispute his status as an enemy combatant. Haupt, of course, did not dispute that he had joined the German army. *Quirin*, 317 U.S. at 20. This admission by Haupt narrows the ruling of *Quirin* even further, and significantly distinguishes the assertion of authority in that case from the authority claimed here. Haupt was detained by the military as an enemy combatant, promptly provided an opportunity to deny his status, refused to do so, and was punished according to law as a result. Padilla has been detained as an enemy combatant, denied any opportunity to challenge his status in any forum, and apparently will remain indefinitely restrained of his liberty. The administration contends that the power to detain Padilla indefinitely for alleged violations of the laws of war is included within the power to try him for that violation. Pet. Br. 33 (citing *Quirin*, 317 U.S. at 31).[17] The administration never explains why its asserted authority to detain Padilla and deny him an opportunity to dispute his status is *less* than the authority to detain Padilla on condition of providing him an opportunity to dispute his status. See 1 William Blackstone, *Commentaries* *132 (noting that "confinement of the person, by secretly

Uniform Code of Military Justice), 10 U.S.C. § 821. Pet. Br. 33. Today's provisions, like those in place when *Quirin* was decided, contemplate a military trial, something the administration has never indicated it intends to provide Padilla.

[16] The present version of Article 38 of the Laws of War, 10 U.S.C. § 836, expands the procedural protections Congress expects military commissions to provide to include not only the rules of evidence but also the "principles of law" generally recognized in criminal cases.

[17] Or, more ominously, of the power to shoot him on the spot. Pet. Br. 42 n.17

hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government" than even the power to deprive a citizen of his life). Indeed, in the criminal context, this Court has recognized that detention of an accused prior to trial is an extreme departure from our societal norms of liberty, see *United States* v. *Salerno*, 481 U.S. 739, 755 (1987), not a mere incident to the power of trial.

By insisting that the government cannot have the power to detain citizens unless Congress expressly so provides, this Court ensures that the political branches will first speak jointly to the fundamental question of what process is due in the delicate circumstances of war-related detention. On matters touching upon national security, it is entirely appropriate that the political branches should speak first. Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981) ("[W]hen [Congress] acts in the area of military affairs.... the Constitution itself requires such deference to congressional choice."). The rule advocated by the administration would shut Congress out of the process. This Court should insist that it be invited in.

During the Civil War, World War II, and the communist scare of the 1950s, Congress believed that national security was sufficiently endangered to authorize the President, when he believed that circumstances were grave enough, to detain citizens in the United States outside the ordinary criminal judicial process. But even then, Congress saw fit to provide meaningful procedural protections to reduce the risk of error or abuse by the executive. Today, there is no comparable congressional authorization. Instead, it is the executive alone that has claimed that circumstances are grave enough to warrant the indefinite detention on United States soil of United States citizens that the executive believes are enemy combatants. In asserting this extraordinary power to infringe the liberty of United States citizens outside the law the President has not seen fit to await congressional

authorization—an authorization that, historically, Congress has never conferred without providing some procedural protections and safeguards. The fact that, when Congress has authorized a detention power, it has seen fit to place greater limits on that authority than the President freely places upon himself only proves that liberty is most secure when the power to make the law is placed in separate hands from the power to enforce it.

CONCLUSION

This Court should affirm the judgment of the Second Circuit below.

Respectfully submitted,

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IN THE

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DONALD RUMSFELD,
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v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF LAW OF WAR EXPERTS AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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IN THE

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DONALD RUMSFELD,
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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF LAW OF WAR EXPERTS AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a), both parties to this case, namely Theodore B. Olson, Solicitor General, Attorney for Petitioner-Appellees United States of America, George W. Bush, Donald H. Rumsfeld and M.A. Marr, Commander, and Donna R. Newman, Esq., Attorney for Respondent-Appellant Jose Padilla, have consented to the filing of this brief by *amici curiae*.

Amici curiae are experts on the law of war and international humanitarian law.

David J. Scheffer is a visiting professor at Georgetown University Law Center, where he teaches public international law, international institutions law, and international criminal law. He is the former U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) and exercised significant responsibility within the U.S. Government for the investigation and prosecution of atrocity crimes (genocide, crimes against humanity, and war crimes) on a global basis. On behalf of the U.S. Government, he negotiated the statutes of and coordinated support for the international and hybrid criminal tribunals of the last decade exercising jurisdiction over atrocity crimes. He is a member of the New York, District of Columbia, and Supreme Court Bars.

Lt. Col. Jeffrey K. Walker (Ret.) is a Senior Fellow at the Institute for International Law and Politics at Georgetown University. He served as a judge advocate in the U.S. Air Force (1988 - 2003). During his tenure, he acted as legal advisor on law of armed conflict policy and implementation and served as law of war advisor to U.S. Air Force Headquarters at the Pentagon. He also taught the law and ethics of war as an adjunct professor of law at the College of William & Mary. He is a member of the Illinois Bar.

They file this brief to bring to the Court's attention critical fundamental guarantees in international humanitarian law that have been overlooked in both the Petitioner's and Respondent's pleadings in this case.

SUMMARY OF ARGUMENT

In this case, the Government has stressed the need to obtain potential intelligence from Respondent Jose Padilla regarding future terrorist acts and has thus sought to justify the extreme measures taken to obtain this information. Such measures include denying Padilla the rights and privileges of a prisoner of war, refusing to bring criminal charges against him, and creating a legal black hole within the territory of the

United States through tortured interpretations of constitutional rights, the law of war, international humanitarian law, and the jurisprudence of this Court—all with the aim of preventing judicial scrutiny. The decision of the Court of Appeals, the pleadings of Padilla's counsel, and other *amicus* briefs address these issues with strong and well-reasoned arguments.

This *amicus* brief addresses only one critical issue that might otherwise be overlooked. In the event this Court reverses (in full or in part) the Court of Appeals and agrees with the Government's contention that "Padilla is an enemy combatant closely associated with al Qaeda and should be detained as such in the course of the ongoing conflict," (Pet. 14), this Court should instruct the Government to provide all fundamental guarantees contained in Article 75 of Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter 1977 Protocol I].[1]

Such fundamental guarantees constitute customary international law binding on the Government by the long usage of civilized states coupled with a universally recognized *opinio juris* reflected in widespread incorporation of these fundamental guarantees into domestic and international legal instruments. These fundamental guarantees include *inter alia* respect for one's honor and religious practices, protection against violence to one's physical or mental well-being, prompt notification of the reasons for one's detention, release from detention with minimum delay, and protection against *post facto* criminalization of one's actions. These customary international law fundamental guarantees are enumerated and memorialized in Article 75 of 1977 Protocol I. As a result, Article 75 constitutes a provision of customary international

[1] International treaties are referred to herein in an abbreviated form. Complete citations are provided in the Table of Authorities.

law protecting Padilla's individual rights and binding upon the Government.

ARGUMENT

I. CUSTOMARY INTERNATIONAL LEGAL NORMS THAT MANDATE FUNDAMENTAL GUARANTEES FOR INDIVIDUAL RIGHTS ARE THE LAW OF THE UNITED STATES.

This Court has held that customary international law, the "customs and usages of civilized nations,"[2] is part of the law of the United States.[3] Customary international law derives from a widespread and consistent practice of nations followed out of a sense of legal obligation (*opinio juris*).[4] The United States, as a State Party to the United Nations Charter and the Statute of the International Court of Justice, has accepted that a secondary source (treaties being the primary source) of applicable law for the International Court of Justice is "international custom, as evidence of a general practice accepted as law."[5] The texts of international agreements not only bind State Parties but can also provide evidence of customary law binding on all states.[6]

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[2] *The Paquete Habana*, 175 U.S. 677, 700 (1900).

[3] *Id.*; *The Nereide*, 13 U.S. 388, 423 (1815) (". . . the Court is bound by the law of nations, which is part of the law of the land."). *See generally* DAVID J. BEDERMAN, CHRISTOPHER J. BORGEN & DAVID J. MARTIN, INTERNATIONAL LAW: A HANDBOOK FOR JUDGES 26-30 (2003); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7-11 (2d ed. 2003).

[4] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

[5] Statute of the International Court of Justice, art. 38(1) (b), 59 Stat. 1055, T.S. No. 993.

[6] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987).

A. U.S. Constitutional Practice, Foreign Practice, And International Treaty Provisions Establish, Through The Conjunction Of State Practice And *Opinio Juris*, That Certain Individual Rights Are Customary International Law.

Each of the fundamental guarantees enumerated in Article 75 of the 1977 Protocol I is common to major legal systems, including "all judicial guarantees recognized as indispensable by civilized peoples."[7] The primary mechanisms for building customary international human rights law include bringing national law and domestic practice into compliance with international principles,[8] incorporating international principles into national constitutional instruments,[9] and invoking

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[7] Article 3 common to the four 1949 Geneva Conventions regarding the treatment of the sick and wounded at sea and on the land, shipwrecked persons, prisoners of war, and civilians. International agreements incorporating the fundamental guarantees included in Article 75 to which the U.S. is a Signatory or State Party include the four 1949 Geneva Conventions, the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 and the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673.

[8] The fundamental guarantees enumerated in Article 75 have long been a part of U.S. and foreign domestic criminal procedure. *See, e.g.*, FED. R. CRIM. P. 5, 6, 16, 23, & 31; Swedish Code of Judicial Procedure, Ch. 24, §§ 4-24 (1979 tr. Burzelius & Ginsburg); German Code of Criminal Procedure, Bk. I, Title IX, §§112-121, Title X, § 134-136a, Title XI, §§ 137-149 (1965 tr. Niebler & Pfeiffer); French Criminal Procedure Code, Bk. I, Title III, §V, arts. 114-118, §VII, arts. 137-138 (1988 tr. Kock & Frase).

[9] Most of the fundamental guarantees that have ripened into customary international law have their foundation in long- respected common law, democratic continental, and U.S. constitutional guarantees. *See, e.g.*, U.S. CONST. amend. I-VIII, XIII-XV, & XIX; THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776); MAGNA CARTA (1297), arts. XX, XXIV, XXXIX, XL, & XLV; CHARTER OF RIGHTS AND FREEDOMS, arts. 7-14 (Canada 1982); DECLARATION OF THE RIGHTS OF MAN, arts. 7-11 (France 1789).

international human rights principles in national policy or diplomatic communications.[10]

Although President Ronald Reagan determined that the United States would not ratify 1977 Protocol I,[11] the few provisions (out of 101 articles) in 1977 Protocol I ultimately contested by the Government did not include Article 75.[12] Indeed, the Deputy Legal Adviser of the U.S. Department of State at the time, Michael J. Matheson, confirmed in explicit terms that Article 75 and most of the other provisions of Protocol I reflected "the principles that we [the United States] believe should be observed and in due course recognized as customary law, even if they have not already achieved that status in their relationship to the provisions of the Protocol."[13]

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[10] The U.S. State Department has issued annual Human Rights Reports for over 25 years. The State Department's human rights homepage states, "The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights." U.S. Department of State, *Human Rights* (2003), *available at* http://www.state.gov/g/drl/hr.

[11] Reagan, President's Message to the Senate Transmitting the Protocol, 23 WEEKLY COMP. PRES. DOC. 91 (Jan. 29, 1987). However, the United States remains a Signatory of 1977 Protocol I.

[12] *See* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT (THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY), OPERATIONAL LAW HANDBOOK 11 (2002) (listing articles of 1977 Protocol I specifically objected to by the U.S. and those (including Article 75) viewed as either legally binding as customary international law or acceptable practice though not legally binding).

[13] Michael Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks before Session One of the Humanitarian Law Conference (Fall 1987), in* 2 AM. U. J. INT'L L. & POL'Y 419, 422 (1987) [hereinafter "Matheson"]. Significantly, a significant extract of the Matheson article is re-published in OFFICE OF THE LEGAL ADVISER, DEPARTMENT OF STATE, CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988 3434-3435 (1995) [hereinafter DIGEST OF UNITED STATES PRACTICE 1981-1988], thus reflecting official Government policy. In 1977, in a report summarizing "the substantive successes of the [1977 Protocol I] Conference in codifying and developing the law applicable in international armed conflict," the U.S. Delegation wrote: "We take satisfaction from the first codification of the customary rule of proportionality (Article 57), from a good definition of mercenaries which should not be open to abuse (Article 47), and from the minimum humanitarian standards (Article 75) that must be accorded to anyone not entitled to better treatment." JOHN A. BOYD, OFFICE OF THE LEGAL ADVISER, DEPARTMENT OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1977 918-919 (1979). In a March 29, 1988 memorandum submitted as an affidavit in the case of *U.S. v. Shakur*, 690 F. Supp. 1291 (S.D.N.Y. 1988), Assistant U.S. Attorney Kerri Martin confirmed that the primary concern of the U.S. regarding 1977 Protocol I, as stressed by other Government officials in 1987 and 1988, dealt with issues other than those reflected in Article 75 of 1977 Protocol I: "While the U.S. is of the view that certain provisions in Protocol I reflect customary international law (see, *e.g.*, Treaty Doc. 100-2, *supra*, at X), the provisions on wars of national liberation and combatant and prisoner-of-war status are definitely not in this category." DIGEST OF UNITED STATES PRACTICE 1981-1988, *supra*, at 3441.

Matheson declined to identify which principles had attained by 1987 the status of customary international law, but he made it unmistakably clear that the United States believed that designated provisions of Protocol I, particularly Article 75, should be complied with by the United States. Matheson stated with respect to Article 75:

> We support in particular the fundamental guarantees contained in Article 75, such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions with-out any adverse distinction based upon race, sex, language, religion or

> belief, political or other opinion, national or social origin, or any similar criteria.[14]

Matheson confirmed the applicability of *all* the fundamental guarantees set forth in Article 75, while pointing by means of example to those rights set forth in sections (1), (2), (4), and (5) of 1977 Protocol I.[15] Matheson explicitly agreed with the statement of Professor Theodor Meron that "the United States basically supports the principles and fundamental guarantees articulated in article 75 of Protocol I."[16]

This obligation applies to international armed conflicts, which are covered by 1977 Protocol I. According to the Government, Padilla participated in an international armed conflict.[17] Since 1987, the Government has never authoritatively questioned the applicability of the Article 75 fundamental guarantees as a matter of customary international law. None of the Government's pleadings in the lower courts or before this Court with respect to this case have suggested any

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[14] Matheson, *supra*, at 427.

[15] *Id.* at 427-428.

[16] *Id.* at 432-433.

[17] The Government clearly has determined that the "war on terror" as it pertains to Padilla is an international armed conflict. The President of the United States has described Padilla as "closely associated with al Qaeda, an international terrorist organization with which the United States is at war" and as an individual who "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States." *See* Petitioner's Motion to Expedite Consideration of Petition for Certiorari and to Establish Expedited Schedule for Briefing and Argument if Certiorari is Granted ¶ 2 (Jan. 16, 2004); *see also* Joint Appendix Volume II, *Hamdi v. Rumsfeld*, 282, 349 (4th Cir. 2003) *petition for cert. granted* (U.S. Jan. 9, 2004) (No. 03-6696) (declaration of Deputy Commander Donald D. Woolfolk, Joint Task Force 170, Guantanamo Bay, Cuba, stating in connection with detainees of the "war on terror" that "our nation is engaged in international armed conflict against terrorism.").

contrary opinion concerning the status of Article 75's fundamental guarantees as binding customary international law.

B. Article 75 Of The 1977 Protocol I Enumerates The Rights Established Through Customary International Law As Fundamental Guarantees.

Article 75(3) of 1977 Protocol I reads:

> Any person arrested, detained or interned for actions related to the armed conflict *shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.* Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.[18]

This principle of prompt notification about the reasons for detention mirrors the obligation of the Government to ensure that "judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible."[19] To date, the Government has never confirmed in any of its pleadings that this fundamental guarantee of minimal information about why one is being detained has ever been complied with regarding Padilla. By denying Padilla access to counsel "subject to appropriate security restrictions" until February 11, 2004 (Pet. 12), and keeping Padilla in solitary confinement and incommunicado from any authorities other than his interrogators and presumably the U.S. military personnel directly involved with his detention, the Government has denied federal courts from confirming, even with counsel to Padilla, whether this single fundamental guarantee of due process protection was ever met.

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[18] 1977 Protocol I art. 75(3) (emphasis added).

[19] Geneva Convention III, art. 103.

If this fundamental guarantee was not met "promptly" following Padilla's arrest and detention, then the Government already has violated the principle of customary international law codified in Article 75(3). Although some degree of isolation for a limited period of time may be a necessary step for interrogation for intelligence purposes, the burden is on the Government to show that the minimum information required by Article 75(3) would so impair intelligence-gathering as to *require* open-ended incommunicado detention. Assuming this burden could be met, one must ask why the Government then failed to justify in any of its public pleadings this necessity for noncompliance with the customary international law requirements embodied in Article 75(3). If such an explanation occurs in the Government's classified declarations, then this Court should openly determine whether Article 75(3) requirements have been satisfied. Regardless, intelligence needs do not constitute an ace of trumps that automatically overrides the countervailing minimal rights of the detainee to know why he is being held. A balance must be struck, open to examination and review by the courts.

The customary international law confirmed in Article 75(6) of 1977 Protocol I requires that Padilla "enjoy the protection provided by this Article" until his final release, "even after the end of the armed conflict." As it now stands, if the Government's conduct in this case is endorsed, this Court has no way of confirming that Article 75 protection in fact will continue in the future, including after the end of the "war on terror," particularly in the event criminal charges are brought against Padilla. Although to date no criminal charges have been filed in any court proceedings against Padilla, the customary international law protections set forth in Article 75(4) and Article 75(7) of 1977 Protocol I would apply if this Court were to decide that the Government's classification of Padilla as an "unlawful combatant" or "enemy combatant" is an unwarranted arbitrary act requiring judicial review.

C. Petitioner's Alleged Status As An "Enemy Combatant" In No Way Affects His Entitlement To These Fundamental Guarantees.

Article 75(1) of 1977 Protocol I confirms that all of the fundamental guarantees set forth in Article 75 apply to an individual who fits the profile of Padilla as described by the Government.[20] Article 75(1) states that:

> . . . persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

Since the Government has denied Padilla the status of (and the more favorable treatment accorded) a prisoner of war under the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 [hereinafter Geneva Convention III], and has denied Padilla an objective review of his status as would normally be required pursuant to Article 5 of Geneva Convention III,[21] Padilla holds the status described

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[20] *See* Petitioner's Motion to Expedite Consideration of Petition for Certiorari and to Establish Expedited Schedule for Briefing and Argument if Certiorari is Granted ¶ 2 (Jan. 16, 2004). *See also* Pet. 37 (distinguishing Padilla's status as an enemy combatant from the status of a prisoner of war).

[21] Persons captured in the field during an international armed conflict by an opposing force have the right to have their status determined by a "competent tribunal." Geneva III, art. 5. If the detainee is to be tried for offenses resulting from his participation in hostilities, he has the right to have his status adjudicated before a "judicial tribunal." 1977 Protocol I, art. 45(2). However, independent of any determination of status, a

in Article 75(1) of 1977 Protocol I in the event this Court concludes that Padilla is an "enemy combatant." Padilla's U.S. citizenship is irrelevant for this particular purpose, as the principles embodied in Article 75(1) apply without adverse distinction based upon national origin.[22]

The Government has stressed that Padilla is not charged with any crimes, and therefore need not be accorded any rights associated with a criminal proceeding, such as right to counsel. (Pet. 33). Even if Padilla 1) is recognized by this Court and thus retains his status as an "enemy combatant" and "unlawful combatant" under the law of war as contended by the Government (Pet. 33), 2) is not charged with any crime, 3) does not appear before any court of law (civilian or military), and 4) is detained indefinitely while the "war on terror" continues, he is entitled at least to the three

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detainee is at least entitled to the fundamental guarantees contained in Article 75. Article 45(3) of 1977 Protocol I leaves no doubt: "Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol." 1977 Protocol I, art. 45(3).

[22] *See* Melysa Sperber, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 AM. CRIM. L. REV. 159, 180-183 (2003). Sperber raises the disturbing possibility of the Government claiming that Article 75 fundamental guarantees do not apply with respect to the actions of the Government in relation to its own citizens. Such a claim would defy a plain text reading of Article 75 and the customary law principles embodied therein. Such an interpretation would resurrect a point of view put to rest with the conclusion of the negotiations that culminated in 1977 Protocol I. A further risk is that any foreign government or non-governmental power (such as militia or para-military forces) could assert U.S. non-recognition of such customary law in this case as license (even if unjustifiable) to deny any such rights to U.S. citizens or military personnel de tained abroad.

fundamental guarantees reflected in Article 75(2), (3) and (6) of 1977 Protocol I.

Article 75(2) describes prohibited acts "at any time and in any place whatsoever, whether committed by civilian or by military agents. . ."[23] All members of the U.S. military are periodically trained that commission of any prohibited acts such as those enumerated in Article 75(2) is subject to penal discipline.[24] Therefore, for purposes of this argument and because information about the precise nature of Padilla's detention is publicly unavailable, one must assume that none of the prohibited acts described in Article 75(2) have been or will be committed against Padilla while in military custody.[25]

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[23] "The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (*a*) violence to the life, health, or physical or mental well-being of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation; (*b*) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; (*c*) the taking of hostages; (*d*) collective punishments; and (*e*) threats to commit any of the foregoing acts." 1977 Protocol I, art. 75(2).

[24] Uniform Code of Military Justice, 10 U.S.C. § 892 (criminalizing failure to obey general order or regulations); CJCSI 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, encl. A, para. 1g (Jan 2000) ("U.S. forces will comply with the Law of War during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with its principles and spirit during all other operations."); DEPARTMENT OF DEFENSE DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM, paras. 4, 5.3, 5.5 (Dec. 1998) (stating in para. 4 that it is Department of Defense policy to ensure that the "law of war obligations of the United States are observed and enforced by the DOD components"); AIR FORCE INSTRUCTION 51-401, TRAINING AND REPORTING TO ENSURE COMPLIANCE WITH THE LAW OF ARMED CONFLICT, para. 3.1 (1994) (mandating annual training in law of armed conflict); ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, paras. 498-508 (July 1956).

[25] *But see* Thomas E. Ricks, *Commander Punished as Army Probes Detainee Treatment*, WASH. POST, Apr. 5, 2004 at A13; Patrick E. Tyler,

Nonetheless, it would be useful for this Court to remind the Government of the Article 75(2) fundamental guarantees and require that it demonstrate that procedures are in place to prevent any such conduct and, if it occurs, to punish any perpetrator responsible for such prohibited conduct.

II. THE GOVERNMENT IS OBLIGATED TO RESPECT AND ENSURE PROTECTION OF THESE FUNDAMENTAL GUARANTEES.

The fundamental guarantees raised in this pleading are exceptionally important to uphold as legal obligations binding on the Government. The customary international law protections set forth in Article 75 of 1977 Protocol I serve to protect U.S. citizens, including military and other official personnel, engaged or otherwise caught up in armed conflict wherever they may be located in the world. Even if the Government were to dispute a foreign government's designation of an American soldier as an individual not benefiting from more favorable treatment as a prisoner of war under Geneva Convention III, Article 75 ensures that such individual will benefit from the fundamental guarantees set forth in that article as a matter of customary international law. If, as a consequence of this case, the Government is allowed to undermine Article 75 fundamental guarantees, then it will place in peril all U.S. citizens and official personnel who must rely on at least these fundamental guarantees even when a foreign government erroneously or maliciously denies any such individual more favorable treatment under any of the Geneva Conventions. The Government defies established legal authority by acting in such a manner as to undermine such fundamental guarantees for its own citizens, including its military, diplomatic, humanitarian, and intelligence personnel operating abroad.

Ex-Guantánamo Detainee Charges Beating, N.Y. Times, Mar. 12, 2004, at A12.

CONCLUSION

At a minimum, the Petitioner is entitled to the fundamental guarantees described in Article 75 of 1977 Protocol I, including those rights that must be provided to individuals engaged in international armed conflict (as contended by the Government in this case) who do not benefit from any more favorable treatment under the Geneva Conventions of 1949 or the customary international law embodied in 1977 Protocol I. The Government has long expressed its belief that Article 75 reflects customary international law. The individual interests of U.S. citizens and official personnel acting abroad will be profoundly threatened if this Court's decision has the consequence of undermining the customary international legal protections incorporated within Article 75.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DONALD RUMSFELD, Secretary of Defense,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
As next friend of Jose Padilla,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JOINED BY THE NEW YORK COUNCIL OF DEFENSE LAWYERS AND THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF THE RESPONDENT JOSE PADILLA

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QUESTION PRESENTED

Whether the President had authority as Commander in Chief to seize Respondent Jose Padilla, an American citizen, in the United States away from a zone of active combat and to detain him indefinitely without charge and without freedom to communicate outside his military prison, based on the President's unilateral determination that Padilla is an enemy combatant who is closely associated with al Qaeda and who has engaged in hostile and war-like acts.

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INTRODUCTION

The Association of the Bar of the City of New York ("ABCNY") respectfully submits this brief as *amicus curiae* pursuant to Rule 37.3 of the Rules of this Court in support of the Court of Appeals' decision. The parties have consented in writing to ABCNY's participation as *amicus curiae* and their written consents have been filed with the Clerk of the Court. The New York Council of Defense Lawyers ("NYCDL") and the American Jewish Committee ("AJC") adopt ABCNY's positions and join in this *amicus* brief.[1]

STATEMENT OF INTEREST

ABCNY is a professional association of nearly 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, ABCNY educates the bar and public about current issues arising in connection with the "war" on terrorism, the pursuit of suspected terrorists, and the treatment of detainees. While it fully understands the importance of preventing future acts of terrorism, ABCNY believes that the President's actions in this and similar cases are dangerously eroding civil liberties and the efficacy of the habeas remedy.

NYCDL, established in 1986, is a not-for-profit professional association whose membership comprises approximately 200 lawyers, many of them former federal prosecutors, who devote a substantial part of their practices to the defense of those investigated or prosecuted for criminal offenses. NYCDL's principal mission is to engage the Bench and the Bar, including government attorneys, in a continuing collegial dialogue concerning the legal, ethical and practical

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[1] No counsel for a party authored this brief either in whole or in part, and no person made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

issues confronting attorneys and judges in the criminal justice system. NYCDL members routinely deal with issues of personal liberty in various contexts, including habeas corpus proceedings. NYCDL is uniquely situated to express an informed view concerning the importance of the habeas remedy and access to counsel. For this reason, NYCDL is particularly supportive of Point III of this brief.

AJC, a national human relations organization with over 125,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil and religious rights of the Jewish community. It is the conviction of AJC that those rights will be secure only when the civil and religious rights of all Americans are also secure. Since the tragic events of September 11, 2001, AJC has continued to advocate for the appropriate balance between enhancing our national security and defending our constitutionally guaranteed civil liberties and the principles of due process of law. AJC believes that striking the appropriate balance requires allowing a United States citizen access to counsel and the courts to challenge his designation, seizure and detention as an enemy combatant.

ABCNY and the joining parties, NYCDL and AJC (collectively, "Amici"), support the Court of Appeals' holding that the President has exceeded his authority in this case, but in part for reasons not advanced by that court. Amici respectfully submit that any decision concerning the scope of the President's authority to seize and detain Jose Padilla must be made in a way that gives appropriate weight to his competing constitutional rights to individual liberty and to petition for his freedom through the Writ of Habeas Corpus.

Amici do not address the tension between executive and legislative authority discussed in the Court of Appeals' decision, including the effect on the President's asserted power of the Authorization for Use of Military Force, Pub. L.

No. 107-40, 115 Stat. 224 (2001) ("Joint Resolution") and 18 U.S.C. § 4001(a). Accordingly, this brief does not conduct the comprehensive analysis that would be required to analyze all three sets of competing constitutional rights and powers—executive, legislative and individual. The purpose of this brief is to identify the individual interests involved and assert that the ultimate analysis must be broader than the government's formulation of the issue. This brief also does not address the jurisdictional issue raised in the first question presented by the Petitioner.

SUMMARY OF ARGUMENT

The Petition asks the court to decide "[w]hether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force . . . to seize and detain a United States citizen in the United States based on a determination by the President that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts, or whether 18 U.S.C. 4001(a) precludes that exercise of Presidential authority." (Pet. at I.) Accordingly, the government asserts, "This case raises fundamental questions about the authority of the Commander in Chief in a time of war." (Pet. Br. at 13.) The government further characterizes the issues as "questions of exceptional national significance concerning the authority of the Commander in Chief to wage the ongoing conflict against al Qaeda." (*Id.* at 16.) Strikingly absent from these formulations is the name of the person who was seized nearly two years ago, who was held entirely cut-off from the outside world for some twenty months and who even today remains in military custody with very little outside contact—Jose Padilla.

The fundamental questions posed by the Petition are before the Court only because Padilla's habeas petition brought them here. The scope of presidential power to seize and detain

Jose Padilla must be decided not on the basis of generalized abstractions, but by specific reference to the ways in which that power was exercised in this case. When resolving a challenge such as this involving fundamental liberty interests, close attention must be paid to the rights at issue. *See Reno v. Flores*, 507 U.S. 292, 302 (1993). Careful scrutiny of the facts giving rise to the dispute is also warranted given that this case requires the Court to comment on the scope of the President's powers as Commander in Chief. *Dames & Moore v. Regan*, 453 U.S. 654, 660-62 (1981).

It is indisputable that "[i]n dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts." *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (Murphy, J., dissenting). But respect and consideration are not synonyms for uncritical acquiescence, particularly where fundamental individual rights are at stake. In Justice Murphy's words:

> At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. 'What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.' *Sterling v. Constantin*, 287 U.S. 378, 401 [1932].

Korematsu, 323 U.S. at 234 (Murphy, J., dissenting).

For these reasons, although they support the Second Circuit's holding, Amici believe that the Court of Appeals' analysis was incomplete. Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952), which the Second Circuit adopted as the framework for its analysis, (Pet. App. A at 28a-55a.), provides a useful structure for consideration of the boundary between congressional and executive powers. But the temporary seizure of a business cannot be equated to the seizure and indefinite detention of a citizen. Padilla's habeas petition implicates fundamental due process concerns that were not at stake in *Youngstown*. The purpose of this brief is to address those concerns.

Specifically, the President's seizure and detention of Padilla implicate his Fifth Amendment right not to be deprived of liberty without due process of law and his right to invoke the Writ of Habeas Corpus to petition for freedom. This Court should not pass on the scope of the President's power to seize and detain Padilla without addressing the significant impact of the President's actions on these fundamental individual rights. (Point I.)

Government detention violates the Fifth Amendment's Due Process Clause "unless the detention is ordered in a *criminal* proceeding with adequate procedural protections . . . or, in certain special and 'narrow' nonpunitive circumstances . . . where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (internal citations omitted). This is not a criminal proceeding. Indeed, on June 9, 2002, the President issued an order declaring Padilla an enemy combatant and *removing* him from the jurisdiction of the criminal justice system. (Pet. App. A at 4a-5a.) Thus, the substantive due process issue is whether the President identified a "special justification" sufficient to support the detention.

The President asserts that Padilla's seizure and detention served two "vital purposes directly connected to prosecuting the war" against al Qaeda. (Pet. Br. at 28.) It prevented him from re-joining the war, and it enabled the military to collect intelligence from him. (*Id.* at 28-29.) Neither justification is particularly persuasive here. Padilla was already "neutralized" when the military seized him, (Pet. App. A at 4a.), and if the allegations against him are true, there are any number of criminal statutes under which he could be charged and detained pre-trial. The government's interrogation rationale at once proves too much and too little. It proves too much because it could be used to justify the detention of anyone the government believes may have knowledge of al Qaeda, whether that person is an "enemy combatant" or not. It proves too little because, even though the government has now admitted that continuing incommunicado detention of Padilla is unnecessary, *see* DoD, *Padilla Allowed Access to Lawyer*, Feb. 11, 2004, *available at* http://www.defenselink.mil/releases/2004/nr20040211-0341.html ("2/11/04 News Release"), it has neither released nor charged him. (Point II.)

The President's asserted power to detain Padilla indefinitely and hold him incommunicado also implicates Padilla's procedural due process rights. Lacking a statutory procedure to challenge his detention, Padilla, through a Next Friend, invoked the Writ of Habeas Corpus. Although the government did not directly challenge Padilla's right to petition for habeas relief, it asked the District Court to eviscerate that right by adjudicating his habeas petition while the government withheld access to the courts or counsel. (*See* Pet. App. B at 142a.) In this sense, the control that the Executive seeks to assert over Padilla is truly unprecedented. No court has ever held that a U.S. citizen detained on US. soil may not exercise the basic procedural due process right to present facts in support of his habeas petition. Even the saboteurs who landed on Long Island in the middle of World War II in

a German submarine wearing German uniforms had an opportunity to present facts in aid of their habeas petitions. *Ex parte Quirin*, 317 U.S. 1, 19-20 (1942). (Point III.)

The right to present evidence and the corresponding right to act through counsel are embodied in the Great Writ itself. The habeas statutes expressly grant a petitioner the right to "deny" and "allege" facts, and impose on the court the obligation to "hear and determine" those facts. 28 U.S.C. § 2243. Absent an ability to present facts and consult counsel, Padilla would have been denied "the necessary facilities and procedures for an adequate [habeas] inquiry." *Harris v. Nelson*, 394 U.S. 286, 300 (1969). The government's position to the contrary, which no court has accepted to date, amounts to a claim that the President may in its discretion suspend Padilla's right to invoke the Writ. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144, 148-49 (C.C.D. Md. 1861) (No. 9,847). (Point IV.)

The questions posed by this Petition are rarely adjudicated, but not entirely novel. Fifty years ago, Fred Toyosaburo Korematsu asked the Court to overturn his conviction for failing to comply with a series of Executive Orders and a statute designed "to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution." *Korematsu*, 323 U.S. at 229 (Roberts, J., dissenting). The majority conceded that "[n]o question was raised as to petitioner's loyalty to the United States." *Id.* at 216. Nevertheless, it rejected the notion that it was "dealing . . . with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States." *Id.* at 223. "[W]e are dealing specifically with nothing but an exclusion order," the majority stated as it upheld Korematsu's conviction. *Id.*

Fifty years later, albeit with the benefit of hindsight, it is clear that the *Korematsu* majority should have paid less attention to the theoretical scope of congressional and executive authority to fashion the exclusion order and greater attention to the effect of that order on Korematsu. To pass on the President's authority to seize and detain Padilla without considering if and to what extent Padilla's constitutional rights limit that authority would be to repeat the mistake of the *Korematsu* majority.

ARGUMENT

I. THE PRESIDENT'S ASSERTED POWER TO SEIZE AND DETAIN PADILLA MUST BE TEMPERED BY PADILLA'S COUNTER-VAILING CONSTITUTIONAL RIGHTS.

This case is rife with important constitutional questions. Yet neither the government's brief nor the Court of Appeals' decision convey the full range of constitutional values, rights and powers at stake. Both focus almost exclusively on the boundary between the President's Article II war powers and Congress's legislative prerogatives under Article I of the Constitution. Neither the government nor the Court of Appeals consider whether other constitutional provisions—such as the Fifth Amendment or the Suspension Clause—limit the President's authority. These omissions are striking because Jose Padilla's fundamental rights to individual liberty and freedom from physical restraint hang in the balance.[2]

[2] Amici recognize that important questions bearing on the constitutional rights of detainees are also before the Court in *Hamdi v. Rumsfeld*, No. 03-6696, but the critical distinctions between Hamdi—who was apparently seized on a battlefield in Afghanistan—and Padilla may provide a complete and distinct basis for evaluating the authority of the President asserted in *Hamdi* without addressing the impact of that authority on the rights of a United States citizen seized under dramatically different circumstances, away from a zone of active combat.

To proceed as if the fundamental rights of the individual seized and detained have no place in the framework for analyzing the scope of executive authority is tantamount to suggesting either that executive authority is absent altogether, as the Second Circuit held, or that executive authority in this area is boundless. Neither of these extremes is an appropriate outcome. The Court should analyze the limits of executive authority in light of the particular circumstances of Padilla's seizure and detention. This approach is consistent with the Court's constitutional role and the separation-of-powers structure that girds our Constitution.

A. The President's Asserted Power To Seize Padilla And Hold Him Indefinitely Should Be Analyzed In Light Of Its Impact On Padilla.

The theoretical scope of the President's power to seize and detain a United States citizen as an enemy combatant is not at issue. Nor could it be. "[B]y the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.'" *Muskrat v. United States*, 219 U.S. 346, 356 (1911); *cf. Flast v. Cohen*, 392 U.S. 83, 96-97 (1968). This limitation mandates a focus on the rights and claims of the parties before the court. *Muskrat*, 219 U.S. at 357. Jose Padilla's habeas petition gave rise to this case and, thus, the facts and circumstances of his seizure must provide the framework for evaluating the Executive's conduct. *See Dames & Moore*, 453 U.S. at 660.

This Court should not overlook Jose Padilla. Attempts to determine the conceptual bounds of the President's powers are "both futile and perhaps dangerous." *Id.* In light of the "never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he much deal and the Constitution under which we all live," *id.* at 662, categorical pronouncements on the theoretical reach of executive power are neither

possible nor desirable. In fact, they are inconsistent with Article III of the Constitution, which "confine[s] [the Court] to a resolution of the dispute before [it]." *Id.* at 660.

This case patently implicates Padilla's most fundamental liberty interest: "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690; *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Where, as here, a fundamental liberty interest is at issue, careful attention must be paid to the "description of the asserted right." *See Reno*, 507 U.S. at 302. Once articulated, it is the Court's role to balance those rights against the asserted presidential powers. *See, e.g., United States v. United States Dist. Court for E. Dist. of Mich.*, 407 U.S. 297 (1972) (balancing the President's national security powers against the individual's Fourth Amendment rights); *Zadvydas*, 533 U.S. at 695 (rejecting the government's contention that absolute deference was due to the executive and legislative branches in the immigration law context, and balancing the executive's power to detain a removable alien against the alien's due process rights); *cf. National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 207 (D.C. Cir. 2001) (Executive is "constrained by" the Fifth Amendment).

Careful attention to individual rights is no less appropriate in cases involving the President's war powers. Generally speaking, "great deference is afforded the President's exercise of his authority as Commander-in-Chief." (Pet. App. A at 30a.); *see also Korematsu*, 323 U.S. at 233-34 (Murphy, J., dissenting). However, deference to difficult military judgments is not absolute. As the Court of Appeals pointed out, "[t]he deference due to the Executive in its exercise of its war powers . . . only starts the inquiry; it does not end it." (Pet. App. A at 31a.) This is true even during periods of

significant peril. While the Executive may have substantial authority during times of conflict to safeguard the public:

> [i]t does not follow . . . that the broad guaranties of the Bill of Rights and other provisions of the Constitution . . . are suspended by the mere existence of a state of war. It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution . . . We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold.

Hirabayashi v. United States, 320 U.S. 81, 110 (1943) (Murphy, J., concurring). Thus, this Court should define the President's powers as Commander-in-Chief in light of Padilla's competing constitutional rights to determine the appropriate boundaries of presidential authority and whether those boundaries have been exceeded in this instance.[3]

B. The Court Of Appeals' Analysis Was Incomplete Because It Did Not Take Into Account Padilla's Constitutional Rights.

The Court of Appeals held that "in the domestic context, the President's inherent constitutional powers do not extend to the detention as an enemy combatant of an American citizen seized within the country away from a zone of combat." (Pet. App. A at 55a). To support this conclusion, the Court of Appeals relied on Justice Jackson's concurring opinion in *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring) (Pet. App. A at 28a.), in which he conceived a

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[3] Of course, the presence or absence of a statute authorizing or proscribing the seizure and detention of suspected enemy combatants would also be relevant to this analysis, but that issue is beyond the scope of this brief.

structure for resolving separation-of-powers questions and demarcating the fluid boundary between executive and legislative authority in particular cases. *Id.* at 635-38. Adopting that approach, the Court of Appeals confined its analysis to the tension between executive and legislative power. The court's analysis did not take in account the critical differences between this case and *Youngstown*. Those differences necessitate a broader constitutional inquiry.

Youngstown arose out of President Truman's wartime seizure of the nation's steel mills. This case, in contrast, involves the seizure and detention of Jose Padilla. The temporary wartime interference with property rights that occurred in *Youngstown* does not raise the fundamental issues of individual liberty caused by the seizure and indefinite detention of a United States citizen on U.S. soil. The constitutional values at stake here are of a different magnitude and call for a more comprehensive analysis. Specifically, the President's actions implicate Padilla's Fifth Amendment right not to be deprived of his physical liberty without due process of law as well as his right to challenge his captivity through the Writ of Habeas Corpus.

Because the Court of Appeals' analysis was incomplete, the court wrongly concluded that these issues are moot. (Pet. App. A at 4a n.1.) They are not. Rather, they are at the heart of the matter. If the seizure and detention of Padilla had been accomplished under a *statute* that permitted the Executive (1) to seize Padilla without setting forth the criteria pursuant to which the seizure could take place; (2) to hold him indefinitely; and (3) to prevent him, at the government's discretion, from presenting facts and consulting with counsel, that *statute* would be subject to constitutional challenge. That the asserted power is executive, not legislative, does not alter the salient characteristics of the seizure and detention at issue. One cannot answer the question whether the President had the authority to seize and detain Padilla without understanding

how and under what conditions he was seized and detained. Indeed, were the Court to answer the government's question without reference to those facts, the implication of its ruling might be that the President's authority to designate, seize and detain an enemy combatant is not limited by the underlying circumstances.

II. THE PRESIDENT'S ASSERTED POWER TO SEIZE PADILLA AND DETAIN HIM INDEFINITELY CONFLICTS WITH PADILLA'S SUBSTANTIVE DUE PROCESS RIGHTS.

The power that the President asserts in this case—virtually unfettered discretion to designate Padilla as an enemy combatant, seize him, and detain him indefinitely without charge—raises fundamental substantive due process concerns. *Cf. Zadvydas*, 533 U.S. at 690 ("[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem"). The Due Process Clause constrains the President's power to prevent its abuse, *Daniels v. Williams*, 474 U.S. 327, 331 (1986), even in wartime, *Hirabayashi*, 320 U.S. at 110 (Murphy, J., concurring). In particular, the Clause prohibits government seizure and detention unless they occur either "in a *criminal* proceeding with adequate procedural protections," *Zadvydas*, 533 U.S. at 690 (emphasis in original), or under "narrow" and "non-punitive" circumstances where a "special justification" outweighs the individual's fundamental rights to liberty and freedom from physical restraint, *id.*

The Executive did not arrest Padilla for committing a crime and is not holding Padilla in anticipation of criminal trial. This appeal arose precisely because the Executive does not want to transfer Padilla to the criminal justice system, replete with its tested procedural safeguards, for prosecution. (Pet. App. A at 55a-56a.)

Civilian authorities initially detained Padilla in connection with a grand jury investigation pending in New York. (Pet. Br. at 4.) On May 8, 2002, acting pursuant to a material witness warrant, federal law enforcement officials arrested Padilla in Chicago. (*Id.*) They quickly transferred him to the custody of the Federal Bureau of Prisons in New York City. (Pet. App. B at 82a.) Approximately one month later, the President designated Padilla an enemy combatant and directed the military to seize him. (Pet. Br. at 4-6.) Padilla has remained under military jurisdiction since then, at the Naval Consolidated Brig in Charleston, South Carolina. (*Id.* at 6.)

The government concedes that Padilla was not seized for committing a crime and that his detention is not punitive. (*Id.* at 29.) Even so, the government justifies its treatment of Padilla as a "simple war measure" that serves two war-related objectives: incapacitation and interrogation. (*Id.*) As to the former, the government states that "detention prevents captured combatants from rejoining the enemy and continuing the fight." (*Id.* at 28.) With respect to the latter, the government contends that "detention enables the military to gather critical intelligence from captured combatants concerning the capabilities and intentions of the enemy." (*Id.* at 29.)

A. Padilla Was Incapacitated In The Custody Of The Bureau Of Prisons Before He Was Seized By The Military And Transferred To The Naval Brig.

Under limited circumstances, the government may seize and incapacitate a dangerous individual outside the criminal context to prevent harm to others. *See Zadvydas*, 533 U.S. at 690; *United States v. Salerno*, 481 U.S. 739, 748 (1987). Preventive detentions are constitutional only when the individual seized is "specially dangerous" and is afforded "strong procedural protections." *Zadvydas*, 533 U.S. at 691.

If the detention is potentially indefinite, then due process requires even closer scrutiny and demands more than a simple demonstration of dangerousness. *Id.*[4]

The government's incapacitation justification rings hollow, given that Padilla was seized from prison. (Pet. Br. at 4.) Putting aside whether Padilla may have been a threat to domestic security while at large, he was in custody at the time he was designated an enemy combatant and transferred to military control. The Court of Appeals found that, at the point he was seized by the military, "Padilla was under the control of the Bureau of Prisons and the United States Marshal Service. Any immediate threat he posed to national security had effectively been neutralized." (Pet. App. A at 4a.) Thus, there was no exigency that required military seizure to prevent Padilla from "rejoining the enemy and continuing the fight." (Pet. Br. at 28.)[5]

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[4] Although this Court has not considered preventive detention of suspected terrorists, *see Zadvydas*, 533 U.S. at 696, neither has it held that the Executive may seize a suspected terrorist and hold him indefinitely, without charge or the ability to challenge the detention in a meaningful way.

[5] Although it did not argue that Padilla represented an imminent threat at the time he was seized, the Executive asserted that Padilla's incommunicado detention was necessary to prevent him from transmitting messages to al Qaeda through counsel. (JA 83.) Vice Admiral Lowell E. Jacoby suggested that "counsel or others given access to detainees could unwittingly provide information and assistance to the detainee, or be used by the detainee as a communication tool." *(Id.)* The District Court rejected this argument as "gossamer speculation," concluding that there was no reason that Padilla could not be effectively neutralized while under BOP control. (Pet. App. B at 152a.) In any event, this rationale appears to have significantly less force today. On February 11, 2004, the Executive announced its intent to grant Padilla access to counsel. *See* 2/11/04 News Release. This decision was ostensibly based on a prior determination that "such access will not compromise the national security of the United States." *Id.* Where, as here, the initial basis for a preventive

Equally as important, the government had other means of incapacitating Padilla at its disposal short of military seizure. The government could have continued his detention as a material witness under 18 U.S.C. § 3144, (Pet. App. A at 55a-56a.), subject to Padilla's right to challenge that detention. The Declaration of Michael H. Mobbs asserts, among other things, that Padilla met with senior al Qaeda leadership, received training to construct and detonate a radiological dispersal device and returned to the U.S. to conduct reconnaissance and carry out attacks. (Pet. App. C at 169a-170a.) The government would be capable of making a strong argument regarding Padilla's detention as a material witness. (*See also* Pet. App. B at 82a.) (recounting that Padilla's initial arrest as a material witness was based on facts set forth in an FBI affidavit).

The Mobbs Declaration also suggests that Padilla could have been charged with various criminal offenses. (*See also* Pet. App. A at 4a at n.2.) (observing that "the government had ample cause to suspect Padilla of involvement in a terrorist plot."); (JA at 84.) ("Padilla has been implicated in several plots to carry out attacks against the United States, including the possible use of a 'dirty' radiological bomb in Washington, DC or elsewhere, and the possible detonation of explosives in hotel rooms, gas stations, and train stations."). Mobbs adverts to evidence that Padilla "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation of acts of international terrorism that had the aim to cause injury to or adverse effects to the United States." (Pet. App. C at 171a.) Mobbs also refers to evidence that Padilla received explosives training and was instructed to

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detention changes or disappears, the Due Process Clause requires that the detention be reevaluated in light of current circumstances. *Cf. O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

conduct reconnaissance and carry out attacks on behalf of al Qaeda. (*Id.* at 170a.) These averments at least suggest that Padilla could have been charged criminally. *See, e.g.*, 18 U.S.C. § 371 (conspiracy to commit an offense against the United States); 18 U.S.C. § 844 (transportation of explosive materials); *United States v. Berberian*, 851 F.2d 236, 237 (9th Cir. 1988) (affirming convictions of Armenian terrorist under Sections 371 and 844). The Executive does not argue that these criminal statutes, or other traditional mechanisms for depriving citizens of their liberty, were insufficient or that emergent circumstances rendered them effectively unavailable in this instance.

The government cites *Quirin* in support of its authority to detain a U.S. citizen on U.S. soil as an enemy combatant. (Pet. Br. at 28-34.) However, *Quirin* does not stand for the broad proposition that incapacitation, standing alone, is a constitutionally permissible basis for seizing and indefinitely detaining a suspected enemy combatant. 317 U.S. at 23-24. In that case, the FBI initially seized the petitioners, German soldiers who had covertly landed in this country during World War II intent on committing sabotage. *Id.* at 20-22. Thereafter, the President issued a proclamation establishing a military commission to try the petitioners. *Id.* at 22-23. In accordance with the proclamation, the FBI surrendered the petitioners to military custody "for trial before the Commission." *Id.* at 23. Unlike in *Quirin*, the President has not seized Padilla to prosecute him in any forum, (Pet. Br. at 29.), but instead posits a broader power to incapacitate him indefinitely, (*id.* at 28.) Because this asserted power to incapacitate by indefinite detention, without trial or even access to counsel, was not before this Court in *Quirin*, that decision does not support the government's position here.

B. The President's Interrogation Rationale Is Unprecedented And Difficult To Reconcile With The Due Process Clause.

The government argues that its need to gather intelligence "concerning the capabilities and intentions of the enemy," (*id.* at 29.), justifies its seizure and indefinite detention of Padilla. This justification is unprecedented, and the government's briefing is bereft of constitutional or judicial support for this power. Moreover, the asserted need to gather intelligence to prevent future acts of terrorism cannot be limited to enemy combatants. This need would justify the seizure of anyone who, in the government's view, possesses "intelligence that could assist the United States to ward off future terrorist attacks." (Pet. App. A at 6a.) The due process problems associated with an unbounded power to seize for interrogation purposes are particularly acute here because the interrogation process "can take a significant amount of time." (JA at 80.) (explaining that it may take months, even years, for interrogation to yield valuable intelligence).

In any event, the government's interrogation rationale appears to have less force in light of the recent announcement that the Department of Defense ("DoD") has authorized Padilla to have access to counsel. *See* 2/11/04 News Release. DoD policy permits enemy combatants to have access to counsel if DoD has either completed its intelligence-gathering efforts, or determines that such access will not impair the military's ability to extract information from the detainee. *Id.* Regardless of which basis applies in this case, DoD's decision to allow Padilla access to counsel reflects an important change in circumstances. As a result of that change, the Due Process Clause requires a reevaluation of the nature and duration of Padilla's detention. *See Zadvydas*, 533 U.S. at 690; *O'Connor*, 422 U.S. at 574-76.

C. The Joint Resolution Does Not Mitigate Substantive Due Process Concerns.

The Executive contends that Congress sanctioned Padilla's seizure and detention through the Joint Resolution. Even assuming this to be true, the Joint Resolution does not mitigate the serious substantive due process concerns in this case because it does not impose any constraints on the President's authority or provide a principled basis for evaluating the President's conduct.

Congress passed the Joint Resolution to authorize the use of force, Pub. L. 107-40, § 2, but did not expressly confer detention authority on the President. The Joint Resolution permits the use of force against individuals and organizations that were in some way connected to the 9/11 attacks. *Id.* Congress did not bestow a broader mandate to pursue all suspected enemy combatants associated with al Qaeda. Indeed, the Joint Resolution does not even mention "enemy combatants," much less define those terms. Thus, assuming the Joint Resolution conveys the power to seize and detain, it does not supply a discernible basis for determining who may be seized. Nor does it identify the bases for seizure or specify how long a detention may last. All of these critical decisions are left to the Executive's unchecked discretion, which is inconsistent with our historical tradition and the very notion of ordered liberty. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

III. THE PRESIDENT'S ASSERTED POWER TO HOLD PADILLA INCOMMUNICADO CONFLICTS WITH PADILLA'S PROCEDURAL DUE PROCESS RIGHT TO BE HEARD.

The government recently announced that it would permit Padilla to have limited access to counsel. This development

does not moot the procedural due process concerns presented here—Padilla's Fifth Amendment rights to be heard and to present his case with the assistance of counsel—which must be considered in the course of evaluating the power the President (asserted and continues to assert) to seize and detain him.

First, the Executive has made clear that it granted access to counsel "as a matter of discretion and military authority," clarifying that such access "is not required by domestic or international law and should not be treated as a precedent." 2/11/04 News Release. Padilla's access to counsel presumably could be revoked or further curtailed at any time in the future.[6]

Second, the issue presented by the Petition is not Padilla's prospective due process rights, but the scope of the asserted Presidential authority. In this case, that means at a minimum an asserted authority to detain Padilla incommunicado for twenty months, even while his habeas petition was being adjudicated, and, after granting some limited right to consult with his lawyer, to reserve the discretion to deprive him of that access at any time.

No court has ever endorsed the government's expansive interpretation of the President's Article II powers, nor otherwise authorized executive power to detain of the sort claimed here. On the contrary, this Court has long upheld and safeguarded the procedural due process rights of habeas petitioners to challenge their status as enemy combatants or military detainees.

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[6] The government has permitted Padilla to communicate with counsel only if a DoD official is present. (Resp. Supp. Br. Opp. Cert. at 2.) All conversations between Padilla and counsel are videotaped and monitored by intelligence officials. (*Id.*)

A. Padilla Has A Constitutional Right To Present His Case.

"The fundamental requisite of due process of law is the opportunity to be heard." *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). Access to the courts is therefore a "fundamental constitutional right." *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *see also Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 (1989). "Rudimentary due process" requires the right to present arguments and evidence and confront adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

This Court has never accepted the contention that it could adjudicate a habeas petition without giving the petitioner the ability to present facts in support of his case, even in a time of war. German saboteurs who landed on Long Island in a submarine wearing German uniforms during World War II, for example, were given the right to present facts—undisputed though most of them were—in aid of their habeas petition, through counsel no less. *Quirin*, 317 U.S. at 19-20. A Japanese General accused of supervising war crimes in the Philippines was likewise given the right to present facts through counsel. *Yamashita v. Styer*, 327 U.S. 1, 5 (1946); *see also id.* at 47 (Rutledge, J., dissenting). Other detainees were afforded the same ability to present a case. *See, e.g., Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (affirming *United States ex rel. Ludecke v. Watkins*, 163 F.2d 143, 144 (2d Cir. 1947) ("Ludecke, the relator-appellant, made an oral argument and submitted a brief, both of which have been interesting and moving.")); *In re Territo*, 156 F.2d 142, 143 (9th Cir. 1946) (petitioner's case was "tried at the hearing on the order to show cause"); *Ex parte Milligan*, 71 U.S. 2, 5-6, 107 (1866); *Colepaugh v. Looney*, 235 F.2d 429, 431 (10th Cir. 1956) (refusing to "preclude access to the courts for determining the applicability of the law of war").

In the government's view, the courts could determine the fate of Padilla's habeas petition without his participation under a standard of review that requires only evidence presented by the government. This position conflicts with the only two decisions of this Court directly to address executive power to detain (and try by military commission) as unlawful combatants individuals arrested on U.S. soil in a time of war, but not on a battlefield, *Milligan* and *Quirin*. Although the outcome of each case was very different, both decisions recognized that the courts have the power to make a *de novo* factual determination in a contested proceeding about the critical jurisdictional fact: Whether the detainee is an unlawful combatant.

In *Quirin*, the Executive Proclamation pursuant to which the petitioners were detained, tried and convicted by military tribunal expressly "denied access to the courts," and the government contended that the petitioners should have no resort to the courts. 317 U.S. at 23-25. Nevertheless, the Court held that the Proclamation could not "preclude access to the courts *for determining its applicability to the particular case*." *Id.* at 25 (emphasis added). The "applicability" of the Proclamation, that is, whether the *Quirin* petitioners were unlawful combatants, was resolved in the initial per curiam opinion, apparently upon stipulated facts. *Id.* at 20, 25, 46. Accordingly, the Court stated it had "no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war." *Id.* at 45-46. Nowhere in the opinion did the Court suggest that it would not have had the power to draw those boundaries, or that its Congressional authority would have been limited to a review of whether "some evidence" supported the Executive's determination that the petitioners were unlawful combatants. On the contrary, the *Quirin* court recognized that it was precisely those jurisdictional boundaries, drawn by the *Milligan* court, that distinguished its holding from *Milligan*:

> We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established.

Id. at 45.

In *Milligan* the Court was asked to answer three certified questions concerning the trial by military commission of a citizen of Indiana in the middle of the Civil War. 71 U.S. at 8-9. Although an Act of Congress gave the President the power to suspend the Writ of Habeas Corpus, the Act also provided that those held by the President "otherwise than as prisoners of war," would have to be indicted or presented to a judge for discharge or other disposition "according to law." *Id.* at 5. On October 5, 1864, Milligan, an alleged member of a 100,000-strong secessionist organization, was arrested, tried, convicted and sentenced to death by a military tribunal for plotting to overthrow the government, aiding the rebels and violating the laws of war, among other things. *Id.* at 6-7.

The *Milligan* Court rejected the Executive's contention that, even if the Act had been violated (Milligan was never indicted or presented to a judge), the trial of Milligan was justified by executive power to impose martial law.[7] The Court asserted "judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no

[7] The government argued that "jurisdiction is complete under the laws and usages of war." *Milligan*, 71 U.S. at 121.

usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service." *Id.* at 121-22. In short, although the Court recognized the power of the Executive to declare martial law under appropriate circumstances, *id.* at 126, it made a *de novo* factual determination that even in the dark hours of the Civil War martial law was not warranted and could not be used to justify Milligan's trial by the military rather than the courts.

Despite their divergent outcomes, *Quirin* and *Milligan* thus demonstrate that one who is seized on U.S. soil away from a theatre of war has the right to challenge directly and substantively the Executive's factual determination that he is an enemy combatant. The authority asserted by the President to detain Padilla indefinitely and without direct access to the courts, has deprived Padilla of the basic due process necessary to make that challenge.

B. Padilla's Right To Meaningful Access To The Courts Encompassed The Right To Present His Petition Through Counsel.

Beyond depriving Padilla of access to the courts, incommunicado detention also deprived him of access to counsel. To determine whether Padilla had a procedural due process right to access to counsel, the Court should examine (1) the private interest affected by official action; (2) the risk of error; and (3) the government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976).

1. *Padilla had a fundamental interest in the assistance of counsel.*

The Court has "frequently emphasized" the importance of *provision* of counsel in any case in which an individual may be deprived of liberty. *In re Gault*, 387 U.S. 1, 73 (1967) (Harlan, J., concurring and dissenting in part); *see also*

Gideon v. Wainright, 372 U.S. 335, 344 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). Indeed, it is well established that the "right to be heard" would be of "little avail if it did not comprehend the right to be heard *by counsel*." *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (emphasis added).

The right to counsel is not confined to cases arising under the Sixth Amendment in the criminal context. On the contrary, courts have frequently found a due process right to *provision* of counsel under the Fifth Amendment in cases in which the liberty interest in freedom from imprisonment has been implicated. *See, e.g., Gault*, 387 U.S. at 41 (commitment of juvenile delinquents); *United States v. Perez*, 330 F.3d 97 (2d Cir. 2003) (deportation of permanent resident); *Iavorski v. INS*, 232 F.3d 124, 128 (2d Cir. 2000) (deportation of aliens); *United States v. Budell*, 187 F.3d 1137, 1143 (9th Cir. 1999) (discharge of insanity acquitees); *Project Release v. Prevost*, 722 F.2d 960, 976 (2d Cir. 1983) (civil commitment). This Court has even recognized a due process right to counsel in proceedings where physical liberty is not in issue. *See Lassiter v. Department of Soc. Servs. of Durham County*, 452 U.S. 18, 31-32 (1981) (termination of parental rights) and *Goldberg, supra*, (termination of welfare benefits).

Though these cases acknowledge the critical importance of counsel in proceedings where significant rights are at stake, the issue here is even more fundamental, because the issue here is not provision of counsel, but mere access to counsel. The constitutional requirement of "meaningful access to the courts," *Bounds*, 430 U.S. at 823, means that reasonable access to appointed or retained counsel (or a surrogate for counsel) cannot be denied. *Procunier*, 416 U.S. at 419; *see also Shaw v. Murphy*, 532 U.S. 223, 231 n.3 (2001); *Johnson v. Avery*, 393 U.S. 483 (1969). As these cases demonstrate,

Padilla had a fundamental interest in being permitted to consult with and present his case through counsel.

2. *The risk of error in the absence of consultation with counsel is acute.*

The risk of error to someone like Padilla forced to contest his detention without access to counsel, particularly given the process insisted upon by the President here, is acute. The government justifies Padilla's indefinite detention based on information derived from unspecified "intelligence sources" and "reports of interviews" with unidentified "confidential informants." (JA at 44.) While these confidential sources supposedly are "believed" to have been involved with al Qaeda, the Mobbs Declaration nowhere states that they *in fact* are al Qaeda operatives or offers any facts that would indicate that the information they have provided is trustworthy. (*Id.*) Quite the contrary, by the government's own admission, these sources "have not been completely candid" and some information they have provided "remains uncorroborated" and may be "part of an effort to mislead or confuse U.S. officials." (*Id.*) It cannot be gainsaid that there is a risk that Padilla may have been wrongfully imprisoned, given that his detention is based on allegations of admittedly suspect informants providing admittedly suspect information, neither of which has been subjected to any kind of judicial review.

3. *The President's interests are insufficient to deny access to counsel.*

Before it granted access to counsel, the government asserted that denial of access to counsel was required to preserve the President's interest in national security by preventing its interrogation process from being jeopardized. (*Id.* at 86-87.) Interposing counsel, the government contended, would have jeopardized the relationship between Padilla and his interrogators and threatened or delayed the

government's ability to secure potentially important intelligence information. (*Id.*)

Critically, the government's assertions about the sanctity of the interrogation process assume precisely the fact that Padilla had a right to challenge through habeas—that he is an enemy combatant. If Padilla is not an enemy combatant, any conceivable basis for the government's asserted right to detain and interrogate him as one evaporates.

Padilla's interests in access to counsel are fundamental and undeniable; the President's interests, while entitled to due consideration, are at least in part speculative and, therefore, ultimately less convincing. Moreover, Padilla's interests coincide with a broader interest of a lawful society in the legitimacy of executive actions. A principal function of the bar is to provide professional counseling and advocacy to both sides of a dispute. The presence of professional advocates inspires confidence that a court's ruling was made with the benefit of full presentations on each side. The government's plan to denude the process of "adversary argument . . . embracing conflicting and demanding interests," *Flast*, 392 U.S. at 97, would undermine the very confidence it should be seeking to engender—namely, that the war on terrorism is not incompatible with fundamental protection of individual liberty.

IV. THE PRESIDENT'S ASSERTED POWER TO HOLD PADILLA INCOMMUNICADO CONFLICTS WITH THE SUSPENSION CLAUSE.

Article I, Section 9 of the Constitution states in relevant part: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." This is one of the few individual rights found in the body of the Constitution itself. Because the Suspension Clause is situated in Article I, only Congress—not the President—can suspend the right to the

Great Writ. *Merryman*, 17 F. Cas. at 148. Indeed, the very purpose of the Writ of Habeas Corpus is to provide a mechanism for reviewing executive detention, *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring), and it is the fundamental safeguard against illegal Executive restraint, *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). Allowing the President to exert control over the primary safeguard against arbitrary executive restraint would conflict with the very structure of our Constitution, which is premised on a system of checks and balances. *See Dames & Moore*, 453 U.S. at 662.

While the government has not contested Padilla's right to petition for habeas review, the conditions of Padilla's confinement amounted to suspension. By holding Padilla incommunicado, with no ability to access the courts or assist those who could, the President deprived Padilla of his right to present his petition. The government, in part, has justified this assertion of power on the ground that the habeas statutes do not confer on Padilla a free-standing right to challenge the factual basis for his detention. That is incorrect.

Padilla petitioned for review pursuant to 28 U.S.C. §§ 2241, *et seq.*[8] The District Court concluded that Padilla had a statutory right to present facts *in this case*, relying principally on section 2243, which states that "[t]he applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts." 28 U.S.C. § 2243. Section 2243 further provides that the habeas court "shall summarily hear and determine the facts, and

[8] 28 U.S.C. § 2241 authorizes the federal courts to grant writs of habeas corpus to prisoners who, like Padilla, are "in custody under or by color of the authority of the United States," *id.* at (c)(1), as well as to those who are "in custody in violation of the Constitution or laws or treaties of the United States," *id.* at (c)(3). Other provisions of the habeas statute, particularly 28 U.S.C. § 2243, establish the procedures to be followed in section 2241 cases.

dispose of the case as law and justice require." These provisions grant Padilla the right to raise and support fact-based arguments and require resolution of factual disputes on habeas review. A court cannot discharge this duty if it only gets to hear the President's evidence. *See Walker v. Johnston*, 312 U.S. 275, 284-85 (1941) (habeas petition could not be adjudicated based on the government's *ex parte* affidavits without opportunity for rebuttal).

More fundamentally, as this Court stated over thirty years ago, the Writ mandates an opportunity to present evidence in cases where the facts are in controversy, as they are here:

> It is now established beyond the reach of reasonable dispute that the federal courts not only *may* grant evidentiary hearings to applicants, but *must* do so upon an appropriate showing.

Harris, 394 U.S. at 291 (emphasis added). While a full-blown hearing, replete with the traditional panoply of procedural safeguards, may not be required in every case, the opportunity to present facts cannot be denied. *Id.* at 298-99. This conclusion applies with extra force where, as here, the petitioner has been detained without pre-detention process, *see Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring), and the proof on which the detention is premised consists solely of a vague affidavit, *cf. Blackledge v. Allison*, 431 U.S. 63, 82 n.25 (1977).

Indeed, the Writ's protections are "strongest" in cases like this when executive detention is challenged, *id.*, because, without judicial scrutiny, such detention "lacks that assurance of legality which has come to be thought of as integral to government under law," Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 984 (1998). *See also Ex Parte Bollman*, 8 U.S. at 75-76 (demonstrating that a core function of the writ is to adjudicate, on the facts, the contention of one held prisoner

on the word of the President that the detention is wrongful—even, or especially, when the charge is levying war against the United States). Accordingly, where, as here, an American citizen is detained under executive authority as an enemy combatant, without judicial or any other process, habeas review is not only available, it is required. *See Hamdi*, 316 F.3d 450, 464-65 (4th Cir. 2003). The President denied Padilla this right.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Executive's asserted power to seize and detain Jose Padilla should be analyzed in light of the deprivation of Padilla's constitutional rights to due process and to petition for his freedom through habeas corpus. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

DONALD RUMSFELD, SECRETARY OF DEFENSE,
PETITIONER

v.

JOSE PADILLA AND DONNA R. NEWMAN, AS NEXT
FRIEND OF JOSE PADILLA,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE ON BEHALF OF RESPONDENT JOSE PADILLA AND GRANTING HIS *WRIT OF HABEAS CORPUS*

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INTEREST OF *AMICI CURIAE*[1]

The Spartacist League (SL) is a Marxist politica! organization with a forty year history of activity in the United States, including running candidates for public office, holding classes and public forums on Marxist history and international and domestic politics, initiating and participating in protest demonstrations against government policies and inaugurating a biweekly newspaper, *Workers Vanguard*, and a theoretical journal, *Spartacist*.

The SL seeks to educate the working class in the historic necessity for all mankind for the reorganization of society on the basis of a planned economy where production is based on human need, not profit. The SL seeks to educate workers and their allies to build a workers party which fights for a socialist future. It seeks to act, as Lenin described the role of the vanguard workers party, as a "tribune of the people." Thus the SL opposes **all** aspects of social oppression and government repression.

The Partisan Defense Committee (PDC) is a class-struggle, non-sectarian legal and social defense organization which champions cases and causes in the interest of the whole of the working people. This purpose is in accordance with the views of the SL. The PDC defends class-war prisoners, those imprisoned for standing up to racist, capitalist oppression, and has campaigned to "Free Mumia Abu-Jamal! Abolish the Racist Death Penalty." It has initiated united-front labor/black mobilizations against fascist organizations.

On February 9, 2002 the PDC with the Bay Area Labor Black League for Social Defense initiated the first labor-centered united-front protest in the U.S. in defense of immigrants on the basis of the slogans, "Anti-Terrorist Laws Target Immigrants, Blacks, Labor—No to the USA-Patriot Act and Maritime Security Act! Down with the Anti-Immigrant Witchhunt!" *Amici* call for: "Full Citizenship Rights for Immigrants." The core of the demonstration was dock workers of the International Longshore and Warehouse Union (ILWU) Local 10, joined by other trade unionists, Asian and

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[1]Counsel for *amici* authored this brief in whole, and no persons other than *amici* made a monetary contribution to its preparation and submission.

Near Eastern immigrants, blacks, college and high school students and supporters of the SL and other leftist organizations. The protest was organized with the understanding that defense of immigrants is defense of the whole working class. The PDC is guided by a principle of the early labor movement of this country: the slogan of the Industrial Workers of the World (IWW), "An injury to one is an injury to all."

The SL and PDC file this *Amici Curiae* brief in support of Jose Padilla because they are tenacious defenders of their own legality and of those democratic rights won through bourgeois revolutions and revolutionary wars—the parliamentary partisans in the English Civil War, the U.S. Revolutionary War, the French Revolution and the American Civil War. It took a bloody civil war to end slavery and another century of social struggle to end *de jure* segregation. The history of the American working class is one of the bloodiest in history. "Free" labor struggled in the face of government troops, strikebreaking court injunctions and prosecutions under criminal syndicalist laws before winning the basic legal right to organize. Out of those struggles working people and minorities wrested some expansion of democratic rights, which under capitalism are highly reversible.

History demonstrates that particularly when the populace is being prepared for war, or the ruling class feels threatened, democratic rights are constrained or denied. As Marxists, *amici* understand that the contraction of constitutionally protected rights is rooted in the class nature of the capitalist state. Harold Laski explains in his treatise, *The State in Theory and Practice* (1935) at 244:

> "...how accidental was the union of capitalism with democracy. It was the outcome, not of an essential harmony of inner principle, but of that epoch in economic evolution when capitalism was in its phase of expansion. It had conferred political power upon the masses; but it was upon the saving condition that political power should not be utilized to cut at the root of capitalist postulates. It would offer social reforms so long as these did not jeopardize the essential relations of the capitalist system. When they did,

> as occurred in the post-war [World War I] years, the contradiction between capitalism and democracy became the essential institutional feature of Western civilization."

A tool of government repression is to declare political opponents of government policy "terrorists." This defines them as "outlaws" of civil society, providing the state with a license to suspend democratic rights, criminalize political activity and ultimately to engage in legalized murder. The terrorist label is a "brand, stain, or mark of infamy...a modern Star of David; it is the contemporary stocks." Mitchell Franklin, "The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution," 4 *Howard Law Journal* at 182 (1958). It was the fate of the Black Panther Party (BPP) to be deemed a "terrorist" organization and "the greatest threat to internal security" by the Federal Bureau of Investigation (FBI), and it was subjected to a Counter-Intelligence Program (COINTELPRO) campaign of harassment, surveillance and prosecution; government agents killed some 38 members of the BPP.

Amici have challenged prior government attempts to criminalize the expression of First Amendment rights by falsely targeting opponents of government policy as terrorists. The SL successfully sued the Attorney General and the FBI in 1983 after the FBI changed its Guidelines designating political organizations as "domestic security terrorist organizations." As a result of that lawsuit, the FBI withdrew its witchhunting "definition" of the SL, thereby conceding that Marxist political principles and advocacy cannot be equated with violence, terrorism, or criminal enterprise.

Seizing on the September 11, 2001 criminal attack on the World Trade Center which killed thousands of innocent civilians, the Bush administration, with bipartisan support, embarked on a so-called preventative and pre-emptive global "war against terrorism." The next day, the SL/U.S. issued a statement:

> "Yesterday's attack on the World Trade Center, carried out through the hijacking of civilian airliners that killed hundreds of passengers and crew, was an

indefensible act of criminal terror. While it may be viewed as a symbol of the wealth and global reach of U.S. imperialism, the World Trade Center had workers of all races, ethnicities and religions who were employed there.... Those who perpetrated this horrific attack...embrace the same mentality as the racist rulers of America—identifying the working masses with their capitalist exploiters and oppressors! The ruling parties—Democrats and Republicans—are all too eager to be able to wield the bodies of those who were killed and wounded in order to reinforce capitalist class rule. It's an opportunity for the exploiters to peddle 'one nation indivisible' patriotism to try to direct the burgeoning anger at the bottom of this society away from themselves and toward an indefinable foreign 'enemy,' as well as immigrants in the U.S., and to reinforce their arsenal of domestic state repression against all the working people."

—*Workers Vanguard* No. 764 (14 September 2001)

In the pages of the SL's publications and in protests by the Spartacus Youth Clubs (SYCs) and the PDC, *amici* have denounced the Executive's assumption of imperial power and the government's witchhunt of immigrants from Islamic/Arab countries and warned that minorities, blacks, labor and all perceived opponents of the government's policies would be targets of this "war on terror." The government's objective is to smear, chill, inhibit, criminalize and penalize dissenting opinion and political action in opposition to government policy as threats to national security and support for terrorism.

"The purpose of the new measures is to revive and deepen the broad-ranging repression and intimidation that marked the Cold War McCarthyite witchhunt of 50 years ago. The aim today as then is to coerce the entire population into ideological conformity, with the government wielding the specter of seemingly pervasive 'Islamic terrorism' as a surrogate for Communism."

—*Workers Vanguard* No. 770 (7 December 2001)

In 2003, the SL and SYCs organized Revolutionary Internationalist Contingents at antiwar demonstrations leading up to and during the U.S. war against Iraq, demanding "All U.S. Troops Out of the Near East Now! Down With U.S. Imperialism! Defend Iraq! For Class Struggle Against U.S. Capitalist Rulers!" In February 2003, when New York City officials, with assistance from the federal government, banned an antiwar march in the name of the "war on terror," the PDC issued a protest and with the SL filed an *amici curiae* brief in the United States Court of Appeals for the Second Circuit.

That the ultimate targets of the "war against terrorism" are perceived political opponents of government policy and the labor movement is ever more apparent. Potential action by labor has been met with threats and government action. Trade unionists–from striking teachers in Middletown, New Jersey in 2001, to transit workers in New York City who voted to strike in 2002, to the National Education Association in February 2004–have been vilified as "terrorists" or "Taliban" intent on a "jihad." In June 2002, when the longshoremen's union on the West Coast was locked in a showdown with union-busting shipping bosses, Homeland Security chief Tom Ridge intervened to threaten that any strike action by the workers would be a threat to "national security." Then the Government brought down the *Taft-Hartley Act* effectively against the union. Firefighters who lost over 300 of their comrades trying to save people in the World Trade Center were declared a "clear and present danger to the United States" in a January 8, 2003 letter signed by Republican House majority leader Tom DeLay because they are unionized. On April 7, 2003, predicated on "intelligence" information in an anti-terrorism "advisory," riot-equipped police at the Port of Oakland opened fire on legal observers, longshoremen and port truckers and antiwar protesters, including supporters of the SL, with wooden bullets and concussion grenades.

The growing popular opposition to the *USA-Patriot Act*, evidenced by the resolutions passed in over 260 communities; the hundreds of thousands across the United States who

marched in opposition to the war against Iraq; as well as the tepid concerns and criticisms expressed by some Congressmen and retired generals during the Iraq War, provoked irate denunciations by the Executive as aid and support of terrorism. Amidst this growing opposition, the renewal of the *USA-Patriot Act* has also become a volatile election issue.

Amici have written that the U.S. imperialist rulers seek to conduct their wars and military adventures, and deal with the threat of domestic class struggle, without the need for Congressional approval, judicial oversight, or even a theoretical nod toward the democratic expression of the populace. Since the collapse of the Soviet Union and the U.S.'s ascendancy as the world's unchallenged military power, there has been a continuing pattern of the executive branch's usurpation of powers constitutionally granted to the judicial and legislative branches. It is the strengthening of what has come to be known as the "imperial Presidency." Over the last two decades, America's capitalists have secured a fabulous increase in their riches and profits through increasing the exploitation of the working class and slashing virtually all social programs benefiting the poor, particularly the black ghetto masses. America's rulers hate and fear the people. It is in the context of increasingly glaring inequality—and the potential for an upsurge in social struggle—that the capitalists' state reinforces its arsenal of repression.

The historical forebears of the SL, the early Communist Party and the then-Trotskyist Socialist Workers Party, were targets of earlier government witchhunts, surveillance, intimidation tactics and criminal prosecutions for advocacy protected by the First Amendment. *Amicus* SL has likewise been subjected to government surveillance and falsely targeted by government agencies as "terrorist" for the expression of Marxist political principles. As an elementary act of self-defense, as well as in support of the democratic rights of all citizens, immigrants and others in the U.S., the SL and PDC submit this *amici curiae* brief in support of Jose Padilla.

All parties have consented to *amici's* filing this brief.

SUMMARY OF ARGUMENT

The issue in this case is whether the President has the authority, as Commander in Chief, to declare a United States citizen, detained in the United States outside a battlefield, an "enemy combatant" in the "war against terrorism" and indefinitely imprison him without bringing charges, holding a hearing, or allowing representation by counsel. Stripped of legalese, what the President asserts is nothing less than the right to disappear citizens.

The Executive has imposed martial law on Jose Padilla, a citizen, on the pretext of an alleged "war on terrorism" which is in fact not a military conflict but a political agenda. This is an unprecedented assertion of imperial powers by the President. Judicial deference to the President's determination of Padilla's status as an enemy combatant would relegate to the President the role of sole arbiter of the exercise and applicability of democratic, constitutional rights. This is consonant with the rationale of a police state.

The treatment of Padilla is intended as both the precursor and legal justification for application of Executive unilateral prerogatives on a broader scale, denying due process protections in criminal prosecutions, immigration proceedings and civil challenges to government policy. It is a frontal assault on the very concepts of due process and citizenship itself. Padilla is being forcibly expatriated, confined to a civil death. The imperial Presidency's objective is nullification of First Amendment freedoms and a qualitative diminution of all democratic rights. The Executive's targets are any and all perceived opponents of government policy, as evidenced most starkly by its preparation last year of the secretly drafted *Domestic Security Enhancement Act of 2003* (Patriot II), which would have allowed the Executive unchallengeable authority to strip citizenship from Americans who "provide material support" to an organization which at some time may be deemed "terrorist" by the U.S. government.

The case of Jose Padilla tests the very existence of the fundamental rights and privileges of citizenship embodied in the Bill of Rights and secured on the battlefield of the Civil War and in class and social struggle over the past hundred

and more years. If the imperial President is upheld, Padilla's detention threatens to become the *Dred Scott* case of our time, a declaration that "Citizens have no rights that the government is bound to respect."

LEGAL ARGUMENT

I. PADILLA IS NOT AN "ENEMY COMBATANT" BECAUSE THE "WAR ON TERRORISM" IS NOT A WAR IN ANY MILITARY SENSE

A. The "War on Terror" Is a Political Construct

The Executive claims it is justified in denying Padilla the constitutional protections attendant to a normal criminal prosecution based entirely on the emergency, preventative, national security needs of a putative ongoing "war against terrorism" being waged throughout the globe and on U.S. territory. It is a "war" without a defined enemy, a war without end. It is in fact no war by any military definition. There is no shooting war and no battle between state powers. The "war against terrorism" is a fiction, a political construct, not a military reality. It is a political crusade conducted in the name of ridding society of a perceived evil. It is no more a "war" in a military sense than a "war against cancer," "war against obesity" or a "war against immorality." Like the "war against communism" and the "war against drugs," this "war" is a pretext to increase the state's police powers and repressive apparatus, constricting the democratic rights of the population. The Executive's declaration that its "war against terrorism" forfeits constitutional protections for designated individuals echoes the regimes of shahs and colonels and presidents "for life" from the Near East to Africa to Latin America, to justify the mass imprisonment and unmarked graves of political dissidents. Like them, the Executive is proclaiming the *right to disappear* citizens of its choosing.

International law envisages two kinds of war: international armed conflicts between two or more countries, and civil wars occurring within the territory of a single state. Neither the Geneva Convention nor later protocols ever acknowledged armed conflict between a state and a transnational organization. The Geneva Convention addresses unlawful combatants, but not in the context of a transnational organization against a country or an alliance of countries. What the Executive has done is selectively apply martial law, placing a U.S. civilian citizen under military authority. This is a constitutional violation of Congress' enumerated "war powers" under Article I. *See Uniform Code of Military Justice*, 10 USC sec. 809; *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

The disregard for what is black letter law on the application of laws of war and imposition of martial law is further evidence that the "war against terrorism" is not a "war" or "armed conflict" but a political campaign for political purposes. It is established legal principle that the Constitution forbids military detention of a citizen captured on American soil, so long as the "[civilian] courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of the actual war." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866). The imperial President knows the "war against terrorism" is not a war, as evidenced by the disavowal that the Geneva Convention protections apply to designated enemy combatants like Padilla, or to the Guantánamo detainees who were reportedly picked up in Afghanistan and Pakistan.

Taking the Executive's position to its conclusion, the assertion of its right to apply martial law means not only that the imperial President can detain enemy captives until the war ends, i.e., indefinitely; but also he has the prerogative to shoot enemy combatants engaged in active hostilities. In the "war against terrorism" that translates to the right to assassinate anyone, anywhere in the world alleged to be a terrorist, not just on foreign soil (as the U.S. has already claimed the right to do), but within the United States. *See* Roth, "The Law of War in the War on Terror," *Foreign Affairs* (Jan./Feb. 2004). Following the Executive's own logic, Padilla could have been shot to death in the Chicago O'Hare airport, just as well as being taken into custody. Thus the construct of the "war against terrorism" would justify not only the right to disappear citizens, but the right to assassinate them as well.

The pretext of "war" is being used by the Executive to circumvent the fact that if Padilla were alleged to be part of some criminal terrorist conspiracy, the government would be

constitutionally required to charge Padilla criminally and accord him a trial with the rights and protections of the Fourth, Fifth, Sixth and Eighth Amendments.

The Government and District Court's reliance on *Ex Parte Quirin*, 317 U.S. 1 (1942) is misplaced. In that case, a German saboteur during World War II claimed U.S. citizenship, and this Court held that for violation of the laws of war even an American citizen could be treated as an "enemy combatant." Unlike the present case, *Quirin* involved a real shooting war between state powers, and the combatants were provided a legal process (albeit a military tribunal) to determine guilt, considerably more process than the Executive or the District Court below has accorded Padilla. Moreover, Quirin, after consultation with counsel, stipulated to the facts supporting the enemy combatant designation.

B. The Imperial Presidency Demands Absolute Judicial Deference—A Move Toward a Police State

Based on the false proposition of an ongoing global "war against terrorism," the Executive asserts that it has the unchallengeable authority to decide who is a terrorist and subject such persons to martial law, demanding absolute and complete deference by the judiciary. This demand of unfettered power by the Executive is a move toward bonapartism, a police state, and requiring a compliant judiciary. Padilla's case is important not only because of the fate of this one man (and the others deemed enemy combatant by this President) but because the legal principles decided will provide precedent for other judicial challenges and justification for new legislation. As Justice Jackson warned in his dissent in the *Korematsu* decision, when the Executive "overstep[s] the bounds of constitutionality,...it is an incident," but when a court "review[s] and approve[s], that passing incident becomes the doctrine." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). Deference to the Executive to deem a citizen an "enemy combatant" on the basis of hearsay "eradicates the Judiciary's own Constitutional role: protection of the individual freedoms guaranteed to all citizens.... Courts must be vigilant in guarding Constitutional freedoms, perhaps never more so

than in times of war." *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (Motz, J., dissenting), *cert. granted*, No. 03-6696 (Jan. 9, 2004). *See also, Duncan, supra*, 327 U.S. at 322-23; *United States v. Robel*, 389 U.S. 258, 264 (1967). [2]

C. The Executive's "War on Terror" and Evisceration of Democratic Rights Are Based on Fabrications

Deference to the Executive is dangerous to the concept of liberty, particularly when the relied-on "factual" representations come from an Administration with a publicly documented propensity for blatant prevarication. American history is replete with examples of outright fabrications and manipulation of truth used to coerce a reluctant populace to go to war and justify other military depredations.[3]

The "war against terrorism" and the "war against Iraq" have comparably fabricated origins. The evidence is now indisputable that the Bush Administration decided within hours of the murderous attack on September 11 to use that event as a pretext for war against Iraq. A link between al Qaeda and Iraq was asserted, although there was no evidence of any cooperation between Saddam Hussein and

[2] Significantly, the Government has relied on a labor case, *Moyer v. Peabody*, 212 U.S. 78 (1909), to justify its claim that a determination by the President in his capacity as Commander in Chief is unassailable and beyond challenge in court. The *Moyer* case is "instructive," but not, as the government would have it, because it represents the state of law today. Rather *Moyer* demonstrates that the so-called "war powers" asserted by the government can and will be used against domestic political opposition, including labor unions, particularly when engaged in the organized withholding of labor—*i.e.*, a strike. *But see Scheuer v. Rhodes*, 416 U.S. 232 (1974) (rejecting argument that courts should defer to Governor's "good faith" in context of supposed 'mob rule' at Kent State University); *Sterling v. Constantin, supra* (Constitution may not be replaced by the "fiat of a state Governor.")

[3] Americans marched into this country's first imperialist slaughter, the 1898 Spanish-American War, under the bloodcurdling call to "Remember the Maine," based on the fiction that the battleship Maine was blown up by an enemy mine. In truth the explosion was caused by a faulty construction design. In order to reverse isolationist sentiment, President Franklin Delano Roosevelt deliberately provoked the Japanese into attacking U.S. military forces, thereby assuring U.S. entry into World War II. Many historians believe the administration knew the attack was coming

Osama bin Laden. Even with the passage of time and the interrogation of some 3,000 Qaeda operatives around the world, the Bush Administration cannot manufacture even a hint of such a link. The war against Iraq (which was in reality a one-sided slaughter) was demanded by the President on the basis of purported hard factual evidence that Iraq possessed "weapons of mass destruction" (WMD) which posed an imminent threat to the U.S. Not only have none been found a full year into the U.S. occupation of Iraq, but there are also daily press exposés of intelligence information documenting that the Administration's claims regarding Iraqi chemical and biological weapons and nuclear capacity were not only false, but known to be false.

In the days immediately following September 11, 2001, the mass roundup of non-U.S. citizens from Islamic countries was justified on the basis of suspicion of terrorism. The Department of Justice's own Inspector General Report, issued June 2, 2003, found a "pattern of physical and verbal abuse" and that detainees were classified as terrorism suspects without evidence. *Department of Justice Inspector General Report*, 2 June 2003. Not one terrorism charge came from that roundup and subsequent registration of 80,000 non-citizen males from Arab countries, but these resulted in some 13,000 deportation proceedings, solely for immigration violations. In the face of blatant proof of the Executive's lies and abuses, Attorney General John Ashcroft not only disclaims wrongdoing but demands from Congress additional state repressive powers—to make their actions "legal."

Jose Padilla's case is itself an example of Administration falsification. Attorney General Ashcroft announced Padilla's

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and did nothing about it to make it that much easier to declare war. *See* Charles Beard, *President Roosevelt and the Coming of the War 1941* (1948). President Truman dropped two atom bombs on Hiroshima and Nagasaki despite knowledge that the Japanese were already trying to surrender, both as an act of pure racist spite and to intimidate the Soviet Union and affect the postwar world order. In 1964 the Johnson administration manufactured a Vietnamese attack on American warships in the Gulf of Tonkin to line up Congressional support for a vast expansion of American bombing and ground troops to Vietnam.

apprehension to a widely publicized press conference in Moscow: "We have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive 'dirty bomb'." That the government knew there was no such "terrorist plot" was revealed in short order. Deputy Defense Secretary Wolfowitz conceded on national television, "I don't think there was actually a plot beyond some fairly loose talk." *Guardian*, 13 June 2002. Former Defense Secretary James Schlesinger stated that the prospect that Padilla had anything to do with a "dirty bomb" was "not realistic," making clear that the issue was "intent" and "threat," not criminal acts. *New York Times*, 11 June 2002. "FBI officials speaking to the Associated Press on condition of anonymity, said their investigations had concluded that Mr. Padilla was probably no more than a 'small fish' with no ties to al Qaeda in the U.S." *Guardian*, 15 August 2002.

The Court of Appeals decision granting Padilla's writ of habeas corpus (*Padilla ex rel. Newman v. Rumsfeld*, 352 F.3d 695) should be affirmed on the most basic grounds, beginning with disavowal of the President's imperial authority to assert martial law in the United States and indefinitely detain a U.S. citizen on the false bases that he is an enemy combatant and that the U.S. is engaged in a timeless and limitless military "war" with al Qaeda.

II. IT TOOK A CIVIL WAR TO ESTABLISH THE RIGHTS AND PRIVILEGES OF U.S. CITIZENSHIP—PADILLA HAS BEEN FORCIBLY DEPRIVED OF HIS CITIZENSHIP AND ATTENDANT RIGHTS IN VIOLATION OF THE CONSTITUTION

Padilla's case presents a frontal assault on the very notion of citizenship. Padilla's designation as an enemy combatant, forfeiting all constitutional protection, constitutes *involuntary expatriation*, precluded under the Constitution. As Chief Justice Earl Warren stated:

> "*Citizenship is man's basic right for it is nothing less than the right to have rights.* Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his country-

men.... His very existence is at the sufferance of the state...deprived of the right to assert any rights. This government was not established with power to decree this fate."

—*Perez v. Brownell,* 356 U.S. 44, 64-65 (1958) (Warren, J., dissenting) (emphasis added)

In *Trop v. Dulles,* 356 U.S. 86 (1958), decided the same day as Perez, the Court declared legislation depriving a person of citizenship following military conviction for desertion from military service during wartime unconstitutional on Eighth Amendment "cruel and unusual punishment" grounds.

"Denaturalization as punishment may involve no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community.... In short, the expatriate has lost the right to have rights."

—350 U.S. at 101.

That is the fate—*civil death*—the Government seeks to impose on Padilla in this case.

The rights of citizenship in the United States are the cumulative product of not only the American Revolution, but the bloody battlefields of the Civil War and the class and social struggles of the 19th and 20th centuries. The expatriation of Padilla, if upheld by this Court, would undo over 200 years of hard-fought gains that have extended the very definition of citizenship. To understand the historic stakes posed in this case, it is necessary to review the historic struggles embodied in the current legal concept of citizenship.

The United States Constitution is in reality three Constitutions, each of which codifies in legal formulations the outcome of vital historic changes in American social history. Each of these Constitutions embodies an expanding conception of citizenship. The First (1787) Constitution arose out of the American War of Independence. That period of

bourgeois revolutionary struggle both coincided with and was part of the Age of Enlightenment, characterized by an ideological adherence to natural rights, hostility to monarchy and suspicion of centralized government. Under feudal monarchies, which justified their power as divinely derived, the bulk of the population were no more than subjects of the crown, *i.e.,* a subjugated population without any political rights. The process of colonization and incorporation of successive waves of aliens into the colonial community resulted in an American citizenship that was not simply a substitution of allegiance to the republic replacing loyalty to the British crown. The ideological conception of citizenship in the American republic was that the Government derived its "just powers from the consent of the governed." *Declaration of Independence.* Yet, in reality, full participation in the American political community was limited to white male property owners. " [B]y the 'rights of man' they meant in actual fact the rights of that limited class of men who owned the instruments of production in society." Laski, *supra,* at 37. As John Jay succinctly put it: "The people who own the country ought to run it."

The conception of the 1787 Constitution was that of separation of powers, including between the states and the federal government. This was called federalism and behind its shield American slavery existed and developed for over half a century before it was destroyed on the battlefields of the Civil War. In substance the 1787 Constitution codified two co-existing and battling social systems, the Southern plantation economy based on slavery and the developing Northern system of capitalism requiring "free labor."

Within two years, the Second Constitution was introduced through the Bill of Rights. But consistent with the federalist "compromise," the Bill of Rights was intended as a protection only against potential excesses of the federal government and not as a protection against the exercise of state governmental authority. The existence of slavery was thus "a major reason why the Supreme Court delayed so long in attempting to enunciate an authoritative doctrine of citizenship. Any effort to eliminate the inconsistencies and ambigu-

ities in the law ultimately would have to address the problem of Negro citizenship." Kettner, *Development of American Citizenship 1608-1870* (1978) at 324.

In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) this Court attempted to resolve that question by denying that black citizenship was a possibility. The central holding of *Dred Scott* was that black people—whether slave or free—were not, and *could not be*, citizens of any of the states or of the United States. This was the underlying position for Chief Justice Taney's infamous declaration that black people "had no rights which the white man was bound to respect." Reflecting the hold of the slavocracy's interests on the Supreme Court, and indicating that the conflict between social systems would not be settled short of civil war, the *Dred Scott* decision held that the Fifth Amendment Due Process clause guaranteed and protected the property rights of the slaveholders; therefore the provision in the Missouri Compromise banning slavery in the territory was an unconstitutional deprivation of property. It was the dissenting justices in the Dred Scott case who stated that "The most general and appropriate definition of the term citizen is 'a freeman'."

It took the defeat of the slavocracy in the Civil War—including participation by 180,000 black troops—to make that concept of citizenship a reality. Only with the defeat of the slavocracy were "the feudal fetters on political and economic freedoms broken or transcended." The competition between the dual economic systems was eliminated. "The Third Constitution codifies the completion of the American bourgeois democratic revolution creating a national American state, founded on the hegemony of the first ten Amendments and of the Reconstruction Amendments, subordinating the federalism of the First Constitution." Franklin, *supra*, at 173-74. The Thirteenth Amendment (1865) abolished slavery.

As a first step toward defining the rights of citizens, the *Civil Rights Act of 1866* was passed to overturn the *Dred Scott* decision. The Act defined all persons born in the U.S. as national citizens and established affirmative rights of free labor to be enjoyed regardless of race: including making contracts, bringing lawsuits, owning property, receiving equal treatment in courts and by government officials. The Act provided that no action by state or local custom could deprive an individual of these basic rights. The Fourteenth Amendment (1866), for the first time, provided a Constitutional definition of national citizenship, applying to "all persons born on U.S. soil or naturalized." The Fourteenth Amendment also prohibited states' restrictions on privileges and immunities of citizens without due process of law or denying equal protection. The Fourteenth Amendment thereby not only recognized national citizenship, but also guaranteed the qualities of citizenship, without which it would be citizenship without content.

Within a mere five years after the passage of the Fourteenth Amendment, its purpose was vitiated by Supreme Court decisions reflecting the emergence of the American imperialist state and the defeat of the great democratic effort of Radical Reconstruction. *Slaughter-House Cases*, 16 Wall. 35 (1873) (Fourteenth Amendment did not make the core rights of national citizenship—due process and equal protection—binding on the states); *United States v. Cruikshank*, 92 U.S. 542 (1876) (Fourteenth Amendment protection was specifically denied in the arena of civil rights); *Civil Rights Cases*, 109 U.S. 3 (1883) (same). The 1896 *Plessy v. Ferguson*, 163 U.S. 537 decision declared "separate but equal" the law of the land, holding that state-required racial segregation did not violate the equal protection clause. During this period, the Fifteenth Amendment mandate that "the rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude" was totally disregarded.

Even while Fourteenth Amendment due process and equal protection were denied to the U.S. citizens for whom it was adopted, the Court ruled that *corporations were "persons"* within the meaning of the Constitution and protected from government regulation under the doctrine of substantive due process. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905). From 1886 to 1912, only two Supreme Court cases restrained or

overturned state action involving discrimination against black people, while 39 times the Court did so in cases involving corporations. As Laski explains, *supra* at 157-58:

> By 1880 the Supreme Court had become the passionate exponent of economic laissez-faire. It remained thus for a quarter of a century. During this period its dominating purpose was simply to prevent interference with business enterprise by government regulation, whether state or federal. It evolved conceptions of liberty of contract, of due process of law, of the police power, of reasonableness, all of which operated to protect business men in the unhampered pursuit of profit.... [T]hey illustrate the inevitability that constitutional law must be subordinated in a capitalist society to the needs of capitalism."

Hence, although many today would take it for granted that American citizenship is a birthright of anyone born here, that modern conception is actually a recent and reversible victory. It took a full century of further class and social struggle after the Civil War for the rights and privileges promised in the Fourteenth Amendment under its due process and equal protection clauses to be held as a matter of law applicable to all citizens of this country. It took the social upheaval of the mass civil rights movement and United States war in Vietnam to break the social and legal lock created during the Cold War with the post-World War II Soviet Union. Moreover, in the context of international competition with the Soviet Union, the American capitalist class found it convenient to play the card of "human rights." Yet that card had limited utility while American citizens were visibly being deprived of the most basic rights. Thus it was only in 1967 that the Court for the first time acknowledged the principle that the Fourteenth Amendment established citizenship as "the constitutional birthright of every person born in this country." In the midst of the civil rights movement, *Afroyim v. Rusk*, 387 U.S. 253 (1967) held that once a person becomes a citizen, Congress cannot deprive him of that status. Afroyim fundamentally adopted Chief Justice Earl Warren's dissent in *Perez*.

Afroyim precludes Padilla's *de facto* expatriation by the

President. Neither Congress nor the Executive can use the implied Constitutional powers to deal with foreign affairs or national security to override the fundamental constitutional right of citizenship and its attendant rights and privileges.

> "There is no indication of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time... Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit."

Id. at 262.

Just as the reality of citizenship for the vast majority of Americans has been the product of convulsive social struggles, the rights of citizenship are reversible in the context of social reaction. With the decline of the social struggles of the 1960s, and particularly with the collapse of the Soviet Union in 1991-92, the American bourgeoisie has taken aim at the rights gained through those earlier struggles. Under the guise of the "war on terrorism," the Executive is now taking aim at the most fundamental right of all—the "right to have rights"—*i.e.*, citizenship. What is posed here is whether Padilla will become the Executive's implementation of a revision of the infamous *Dred Scott* decision: *Citizens have no rights that the government is bound to respect.*

III. PADILLA IS DEPRIVED OF HIS LIBERTY IN VIOLATION OF DUE PROCESS

The detention of Jose Padilla as an "enemy combatant" cuts at the heart of the core protections of the First, Fourth, Fifth, Sixth and Eighth Amendments which provide the content to the rights and privileges of citizenship. Freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504, U.S. 71, 80 (1992). This Court has long recognized both substantive and procedural limits placed on government capacity to restrain individual liberty, even in the face of a "national emergency" or war, so long as civilian courts were functioning. *See Ex Parte Milligan, supra. See also Youngstown Sheet & Tube Co. v. Sawyer,*

343 U.S. 579 (1952); *Ex Parte Endo*, 323 U.S. 283 (1944), and *Sterling v. Constantin*, 287 U.S. 378 (1932). There is not a single sentence in the Constitution that declares exceptions to these principles, let alone an exception for a citizen detained outside a battlefield as an "enemy combatant."

Nor can there be any question that Padilla's liberty is being taken without due process of law, which at a minimum means the right to be apprised of charges against him and to challenge these charges in a judicial forum with the benefit of legal counsel. It also requires that he be *presumed innocent* until proven guilty beyond a reasonable doubt. Central to the Executive's treatment of Jose Padilla is its assertion that any "fact" tending to support the President's designation of Padilla as an "enemy combatant" mandates he be deemed so, and as a consequence stripped of all constitutional rights. While Padilla is deprived of the presumption of innocence, the Government is bestowed an irrebuttable presumption of veracity.

With the cases of Jose Padilla, as well as Yasser Esam Hamdi,[4] John Walker Lindh and Zacarias Moussaoui, and the hundreds detained at Guantánamo, the Government seeks to institutionalize in the American justice system the arbitrary deprivation of rights that are the hallmarks of right-wing dictatorships propped up around the world by U.S. imperialism.[5] In short, the Executive is establishing a parallel legal system, one with no laws or rules, for anyone the President chooses to disappear.

Internationally, the U.S. has kidnapped foreign nationals suspected of terrorism, imprisoned suspects indefinitely and authorized assassinations, overriding international conventions and its own longstanding ban on assassinations. The U.S. government is holding over 600 prisoners, including teenagers detained as juveniles, as enemy combatants at the American base in Guantánamo, Cuba, refusing to treat them according to international conventions as "prisoners of war."

[4] *Amici* submit that the indefinite detention of Yaser Esam Hamdi, an American citizen allegedly detained in a "zone of combat" in Afghanistan, violates the Due Process clause of the Fifth Amendment, and urge that the Fourth Circuit decision in his case be reversed. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, No. 03-6696 (Jan. 9, 2004).

Additionally, the Executive is gutting "fair trial" and due process protections applied in criminal prosecutions. For example, the prosecution sought to try Zacarias Moussaoui in proceedings closed to any public scrutiny, but also to deny him even the right to review critical evidence because he is not cleared for security proceedings. The Executive is wielding the threat of declaring individuals charged in the criminal courts as "enemy combatants" in order to coerce "cooperation" or guilty pleas.

Prior to September 11, the Supreme Court has repeatedly held that the due process and equal protection clauses of the Fifth and Fourteenth Amendments are applicable to immigrants. *Plyer v. Doe*, 457 U.S. 202 (1982); *Wing Wong v. U.S.*, 163 U.S. 22 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Zadvydas v. Davis*, 533 U.S. 678 (2001). But by the very fact that non-citizens have no inalienable right to be in the United States, without citizenship there is no "right to have rights." For example, while the First Amendment formally grants immigrants the same speech and association rights as U.S. citizens, the exercise of those rights carries with it the risk and fear of detention and deportation.[6]

In short, the decision on Padilla's case is intended by the Executive to provide a post-facto legal basis for what the government has been doing pre-emptorily since September 11. Asserting "national emergency," some 1,200 immigrants from Arab/Islamic countries were rounded up and detained as putative "terrorists." The Executive, with bipartisan support, rammed through Congress the draconian *USA-Patriot Act* authorizing widespread wire-tapping, surveillance and break-ins on the basis of political advocacy and establishing sweeping legal authority for secret mass detentions and deportations of immigrants; implemented new FBI Guidelines reviving the deadly COINTELPRO campaign of

[5] *Amici* would point out that the "anti-terrorism" laws of Peru, which provided for trial by hooded judges, with no right of the accused to call witnesses or confront their accusers, granted more rights than this Executive has accorded Padilla. Peru recently declared those laws to be unconstitutional.

surveillance, intimidation, disruption and frame-up; ordered military tribunals for non-citizens seized in Afghanistan and Pakistan, holding them in torturous conditions in Guantánamo. The Government has laid the groundwork for an all-encompassing government spying apparatus, from the Pentagon's Big Brother *Terrorist Information Awareness Program* to surveillance of travel via the *Computer Assisted Passenger Pre-Screening System* (CAPPS II).

The President's assertion of the prerogative to strip citizens of their rights and lock them away indefinitely without charges, lawyers or trials and to deny all known formal protections of the First, Fourth, Fifth and Six Amendments is an unprecedented assertion of imperial power. Under the pretext of the "war against terrorism," the Executive has dismantled those formal protections and limitations on police and government powers—particularly in the application of all forms of secret surveillance, detention plans, anti-immigrant policies and counter-intelligence disruption techniques, including murder and legal frame-ups—that were won in the quarter century encompassing the mass civil rights movement, the U.S. defeat in Vietnam and the Watergate exposure that government dirty tricks extended even to representatives of the capitalist ruling class. The substantial danger and significance of the new laws, orders and directives lie in the fact that they constitute a full-scale legalization and mandate for the state to conduct its spying, harassment, prosecution and worse against immigrants, blacks and all perceived political opponents. What the government previously did in secret it now seeks to do with the authority of a legal mandate.

IV. PADILLA'S DETENTION AS AN ENEMY COMBATANT POSES A GRAVE THREAT TO THE FIRST AMENDMENT RIGHTS OF EVERYONE

To retool its machinery of repression under the guise of

[6] In the wake of the post-September 11 anti-immigrant witchhunt, this Court recently upheld a provision of the draconian 1996 Illegal Immigration Reform and Responsibility Act mandating imprisonment of legal immigrants who are facing deportation for even the most minor convictions at some point in their lives. Demore v. Kim, 123 S. Ct. 1708 (2003). Among other reasons this underscores why *amici* call for full citizenship for all immigrants.

its "war on terror," the Executive seeks to fashion a new, more dangerous arsenal of thought-crime conspiracy laws, prosecuting its victims on the basis of political views and associations rather than conduct or actions. The threat posed by this could not be graver, for no aspect of citizenship is more fundamental than the rights accorded by the First Amendment. The First Amendment is the "keystone of our Government...the freedoms it guarantees provide the best insurance against destruction of all freedom," stated Mr. Justice Black, dissenting in *Dennis v. United States*, 341 U.S. 494, 580 (1951). It was to protect the exercise of the political freedoms codified in the First Amendment that the proscriptions on unlawful search and seizure, prohibition on excessive bail (*i.e.*, indefinite detention), right to counsel and the due process clauses were adopted as part of the first ten Amendments to the U.S. Constitution. *See Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961).

A. Padilla Is Deemed an Enemy Combatant on the Basis of Alleged Association

The Presidential Order declaring Padilla an enemy combatant is based on assertions that "Padilla is closely associated with al Qaeda....engaged in hostile and war-like acts" including unspecified "conduct in preparation for acts of international terrorism," possesses information that would be helpful in preventing al Qaeda attacks, and represents a "continuing, present and grave danger to the national security of the United States." His incarceration is not based on the commission of any crime, or even the allegation thereof. Instead it is expressly based upon his purported associations. Padilla cannot be deprived of his liberty based on undefended allegations of association and vague hearsay assertions of intent to commit some future act. With the sweep of his hand, the President has simply declared Padilla an enemy combatant, thereby denying him those fair trial protections accorded to criminal prosecutions.

The basis for Padilla's unlawful detention in the absence of any crime even being charged, let alone committed, is mirrored in both the Patriot Act and its proposed reinforcement, Patriot II. Both Acts threaten a wide scale of government

attacks from wiretapping and break-ins to indefinite detention and, if Patriot II is passed, loss of citizenship. The trigger of such repressive measures is the nebulous act of providing "material support to terrorism." What constitutes "material support" can be anything the government doesn't like. And what organizations are deemed "terrorist" can vary from day to day, depending on the Administration's whims. As the case of attorney Lynne Stewart illustrates, this provision in the earlier 1996 *Anti-Terrorism Act* provided the basis for the government to indict a political activist attorney as a terrorist co-conspirator. *See United States v. Sattar et al.*, No. 02 Cr. 395 (S.D.N.Y.), Superceding indictment filed November 19, 2003 (charging Stewart with "material support" of terrorism for zealously representing client charged with terrorism).

B. The Government's Position Is the Latest Extension of a Long History of Invoking Thought-Crime Laws and Detention During Times of War and Social Struggle

The seminal case arising out of the Nixon Administration's use of politically motivated and warrantless surveillance against opponents of the U.S. war in Vietnam is *United States v. United States District Court*, 407 U.S. 297 (1972), which precluded the Executive from assuming power in violation of the Constitution.

> "History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the government attempts to act under so vague a concept as the power to protect 'domestic security'."
>
> —407 U.S. at 313

In his book, *All the Laws But One: Civil Liberties in Wartime* (Knopf/Vintage, 1998), Chief Justice William Rehnquist asserts that "in times of war, the law is silent," and admiringly quotes Francis Biddle, Roosevelt's attorney general:

"The Constitution has not greatly bothered any wartime president." Rehnquist further states that "In times of war, presidents may act in ways that push their legal authority to its outer limits, if not beyond." Particularly in times of war, or fear for "national security" in the face of revolutionary upheaval abroad or class struggle at home, the government has whipped up hysteria as a pretext to justify denying First Amendment rights and other core constitutional protections to the population. In virtually every instance the courts upheld the government's acts (at least initially).

The Bill of Rights was less than a decade old in 1798 when war hysteria prompted by the Jacobin French Revolution prompted the Federalist-dominated United States Congress to enact the *Alien and Sedition Acts*. Constitutional challenges to the Acts were generally precluded in the federal courts. The American bourgeoisie's emergence as an imperialist power was also prepared by, and fueled, attacks on the U.S. working class, particularly targeting immigrant workers. From the national railway strike of 1877 to the execution of the Haymarket martyrs in 1887 to the 1892 steel strike in Homestead, Pennsylvania, the class struggle was marked by one labor massacre after another. The 1890 *Sherman Anti-Trust Act* was used to criminalize labor unions. A 1902 anti-anarchist law in New York became the model for state and federal "criminal syndicalism" laws which targeted organizations and individuals seeking "a change in industrial ownership or control, or effecting any political change." In 1903 Congress passed the first legislation barring immigrants who "believe in or advocate the overthrow by force and violence" of the U.S. government.

During World War I and in fearful reaction to the Russian Revolution, *the Espionage Act* (1917) and the *Sedition Act* (1918) were passed. These Acts targeted not "German spies" but labor agitators, opponents of U.S. entry into World War I, anarchists, and "reds," thousands of whom were imprisoned. Among them was Socialist Party leader Eugene V. Debs, for a speech containing the incendiary message to workers: "You need to know that you are fit for something better than slavery and cannon fodder." *See Debs v. United States*, 249 U.S. 211

(1919). *See also Schenck v. United States*, 249 U.S. 47 (1919). Soon after, the notorious Palmer Raids in 1919 caused the detention and deportation of thousands of immigrants accused of being anarchists or "reds."

In 1940 Congress, concerned with the increased possibility of the United States entering into World War II, passed the *Alien Registration Act* (better known as the *Smith Act*). The first to be prosecuted for their opposition to the impending interimperialist war were the Trotskyists of the Socialist Workers Party, many of whom had played a leading role in the 1934 Minneapolis Teamsters strike. The convictions for "seditious conspiracy" were affirmed by the Court of Appeals, *Dunne v. United States*, 138 F2d 137, and this Court refused review, 320 U.S. 370 (1943).

The history of state repression also includes many instances of threatened and actual mass detentions. The internment of American citizens of Japanese descent during World War II, *Korematsu v. United States, supra*, is a notorious example of trampling on democratic rights of citizens during wartime. In February 1942, Roosevelt issued Executive Order 9066, which authorized detention and relocation of Japanese residents in the U.S., in the majority native-born U.S. citizens, into concentration camps. Congress quickly ratified the order. This Court upheld the imposition of martial law, stating, "When under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger." *Korematsu v. U.S., supra.* Forty years later, in *Korematsu v. United States*, 584 F. Supp 1406 (N.D. Cal. 1984), his conviction was reversed on the grounds that the government misrepresented the existence of "intelligence" justifying or providing a clear, military necessity for evacuation orders in the first place.

Although the numbers detained under the guise of the present "war against terrorism" are much smaller than the numbers of Japanese-Americans detained during World War II, the degree of unilateral power presently asserted by the Executive is far greater than before. The Japanese Americans were relocated, costing them loss of property, but they were not held incognito, nor denied access to the civilian courts, as

today's "enemy combatants" are. The President also asserts an "inherent" right to disappear citizens even in the absence of Congressional authorization.

Following World War II, plans were laid for additional mass detentions at the height of the McCarthyite anti-communist witchhunt. Deeming the Smith Act to be insufficient protection against threats to internal security, in 1950 Congress enacted the *Internal Security Act of 1950*, 50 USC 781-798, 811-826, amended 1968, more commonly known as the *McCarran Act*. This Act went beyond prohibiting advocacy of force and violence. Title I was an elaborate scheme of registration for certain types of organizations, known as the *Subversive Activities Control Act;* Title II was a separate criminal sedition law. Title III of the Act was the *Emergency Detention Act*, permitting detention of suspected subversives in periods of emergency. It also provided for the deportation of aliens found to be Communists at any time in their lives. During the Cold War a "Security Index" kept by FBI headquarters contained nearly 12,000 "leaders" while the "Communist Index" added another 17,000 members. The anti-Communist Security Index, supposedly dismantled in the 1960s was resurrected as the Administrative Index (ADEX). The SL was among 16 organizations designated on the ADEX file for "special attention."

In 1961, the *Subversive Activities Control Act* was upheld by this Court against the Communist Party. However, Government attempts to enforce the subsequent registration order proved fruitless—each attempt was successfully challenged on the grounds that prosecution of individuals for failure to register violated the Fifth Amendment protection against self-incrimination. Ultimately this Court concurred, striking down the prosecutions on Fifth Amendment grounds but leaving the Act in force.

The detention provisions were to spring into operation upon the President's proclamation of an emergency in the event of invasion, declaration of war, or insurrection in aid of a foreign enemy. There was no provision for judicial proceedings before detention and only limited review, in which the evidence could be withheld, after detention occurred.

C. By Its Letter and History, 18 U.S.C. sec. 4001(a) Is Dispositive of this Case

The *Emergency Detention Act's* provisions were never invoked, and ultimately it was repealed in 1969 as one of the democratic gains emanating from the social struggle of the civil rights and Vietnam antiwar movements of the 1960s and early '70s. When the *Emergency Detention Act* was repealed, the Congressional Report ends with: "Repeal of the Act alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority." As a result, at the same time Congress repealed the Emergency Detention Act, it also enacted 18 U.S.C. sec. 4001(a), which provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Section 4001(a)'s clear, straightforward disavowal of Presidential imperial power to detain citizens without lawful authority is the sole legislative constraint on the Executive's police power to come out of the brief period of expansion of judicial recognition of democratic rights during the civil rights movement and Vietnam War period. Those democratic rights, won through social struggle, are reversible, and have been chipped away over the past 30 years. The Act also recognized the long history of the government's improper detention of political opponents and minorities. *Padilla*, 352 F.3d at 719-20.

By its plain language as well as its legislative history, Section 4001(a) is determinative of this case, and should be upheld against the Executive. Section 4001(a) was intended to constrain the imperial Presidency's impulse to detain any it views as hostile to its aims. The need for such constraint is confirmed by the long series of largely Executive actions since section 4001(a) was enacted which are contrary to its clear injunction against detention of citizenship. As early as 1970, the same year section 4001(a) was passed, a proposal was drafted calling for martial law and the establishment of "relocation" camps for black people in the event of a black uprising. In 1978, the *Foreign Intelligence Surveillance Act* (FISA) was passed, authorizing secret electronic surveillance and physical searches of agents of a foreign power, including

U.S. citizens at home and abroad. The 1983 FBI Domestic Security/Terrorism Guidelines replaced more restrictive self-imposed FBI rules in the wake of the Watergate, CIA and FBI/COINTELPRO exposures. These regulations redefined what had been deemed "subversive" activity as "terrorist," authorizing investigation of left-wing organizations although no crimes had been committed or even alleged. In 1984, the Reagan Administration drafted plans to empower the Federal Emergency Management Agency (FEMA) to appoint military commanders to run state and local governments in the event of a national emergency. After the U.S. bombing of Libya in 1986, the Immigration and Naturalization Service drew up a similar "contingency plan" for "alien terrorists and undesirables" that called for rounding up thousands of Arab immigrants and herding them into an already prepared concentration camp in Louisiana.

Clinton's *Violent Crime Control and Law Enforcement Act* of 1994 and the *Anti-Terrorism and Effective Death Penalty Act of 1996* had the combined impact of a legislative rollback of various court decisions enforcing constitutional rights. The Crime Bill allowed evidence seized in an illegal search to be admitted into evidence, provided billions of dollars to build prisons and increase the number of police on the streets. The 1996 *Anti-Terrorism Act*, established a wide range of anti-immigrant procedures. The law defined foreign terrorism, provided for the Secretary of State to designate foreign terrorist organizations and made it a crime to provide "material support" to any proscribed terrorist organization and a crime to support terrorist activity abroad. These Executive fiats reach their culmination in the present case, in which the Executive asserts its unilateral right to disappear citizens under the guise that they are "enemy combatants."

Although initially denying any need for Congressional authority for the detention of a U.S. citizen on U.S. soil, the Executive now seeks to find such authority in the Joint Resolution. As the Court of Appeals correctly held, that Resolution does not contain any explicit authorization to detain citizens off the battlefield. 352 F.3d at 723. Such express authority would be required not only to overcome

the clear statutory mandate of section 4001(a), but also the mandate of the *Posse Comitatus Act*, 18 U.S.C. sec. 1385, prohibiting the military from acting as law enforcement agents without express Congressional authorization. But more fundamentally, Congress is no more empowered than the Executive to order that citizens be disappeared without due process of law.

CONCLUSION

What this Court decides regarding the fate of Jose Padilla has direct and immediate ramifications way beyond the particulars of this case. To grant the Executive the power to declare any perceived political opponent a "terrorist" and therefore an "enemy combatant"—which is precisely the power that the President asserts in this case—would eviscerate the rights of the working people, minorities and the oppressed to associate in common struggle against oppression and exploitation. At the most basic level, Padilla's case will be critical to establishing whether this Executive will obtain blanket judicial approval for a wholesale evisceration of democratic rights. In demanding deference as Commander in Chief, the President is asking for nothing less. This bald attempt to substitute Executive fiat as the Supreme Law of the Land must not be countenanced. For the reasons stated above, the opinion of the Court of Appeals should be affirmed.

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No. 03-1027

IN THE

Supreme Court of the United States

DONALD RUMSFELD, Secretary of Defense,
Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN,
As next friend of Jose Padilla,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS REGARDING CHOICE OF FORUM AND PROPER HABEAS RESPONDENT ISSUES

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QUESTIONS PRESENTED

1. Should this Court redefine "jurisdiction" in 28 U.S.C. § 2241(a) to mean "territorial boundaries" when nothing in the legislative history suggests that Congress intended to alter the plain meaning of the term—the power of a court to hear a case—and when, in habeas as in civil litigation generally, the reach of this power has expanded as Due Process limits on service of process have continued to evolve?

2. Should this Court create a "single-respondent-immediate-physical-custodian" rule given that this construct is conceptually incoherent, lacks statutory foundation, relies on an obsolete notion of "custody," and is inconsistent with the modern focus on procedural practicalities and functional pleading?

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BRIEF OF *AMICUS CURIAE* PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS REGARDING CHOICE OF FORUM AND PROPER HABEAS RESPONDENT ISSUES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Public Defender Service for the District of Columbia (PDS) is a federally funded agency that represents indigent criminal defendants in the District of Columbia (D.C.).[1] The vast majority of D.C. Code offenders are incarcerated outside of D.C., and choice of forum questions like the ones presented in this case regularly arise when a prisoner

[1] Accompanying this brief are letters of consent to its filing. No counsel for a party authored this brief in whole or in part, and no person, other than *Amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

held pursuant to a D.C. conviction seeks to invoke the jurisdiction of the D.C. courts under 28 U.S.C. § 2241. If this Court adopts the government's sweeping "jurisdictional" and proper party proposals, D.C. prisoners will be forced to bring their D.C.-related habeas claims in, for example, Ohio, South Carolina, or Massachusetts—any forum *other than* the one whose bench and bar are uniquely equipped to handle the litigation. PDS has a strong interest in preserving its ability to represent its clients in habeas proceedings in local courts.

In addition, it may be helpful for the Court in this case to examine the history of habeas forum litigation in D.C.—a cautionary tale in the use of misguided and profitless habeas choice of forum rules of the sort espoused by the government. Such rules were applied in D.C. under the regime of *Ahrens v. Clark*, 335 U.S. 188 (1948), but were largely discarded when that decision was overruled. Even though D.C. demonstrated that venue rules are an efficient means of assessing choice of forum in habeas, the government has recently revived a debate over "jurisdictional" limits with its effort to use *Ahrens*-type rules to bar D.C. prisoners with D.C.-related claims from D.C. courts.

INTRODUCTION

The government asks this Court to frustrate the fair and efficient administration of habeas cases by compelling district judges who are assessing a petitioner's choice of forum to give talismanic significance to two factors, the petitioner's location and the identity of his "immediate physical custodian." The former is relevant but not always dispositive when assessing choice of forum; the latter is impossible to define coherently and is completely beside the point. It would be hard to countenance such an illogical forum selection analysis even if the habeas statutes unambiguously compelled it. But the language, history, and purpose of the habeas statues, as well as this Courts' precedents, do not permit the government's jurisdictional and pleading proposals, much less

require them. The lower courts thus correctly rejected the government's arguments and properly conducted the type of thoughtful choice-of-forum analysis that Congress and this Court have commanded in habeas as in every other civil litigation context.

ARGUMENT

I. THE GOVERNMENT'S INVITATION TO IMPOSE STRICT TERRITORIAL LIMITS ON HABEAS JURISDICTION AND TO CREATE A "SINGLE-RESPONDENT-IMMEDIATE-PHYSICAL-CUSTODIAN" RULE SHOULD BE REJECTED.

A. Nothing In The Legislative History Suggests That Congress Intended To Redefine "Jurisdiction" In 28 U.S.C. § 2241(a) To Mean "Territorial Boundaries"; Jurisdiction Has A Plain Meaning—The Power Of A Court To Hear A Case—And, In Habeas As In Civil Litigation Generally, The Reach Of This Power Has Expanded As Due Process Limits on Service of Process Have Continued To Evolve.

The government's primary argument is that a federal court does not act "within its respective jurisdiction" under 28 U.S.C. § 2241(a) when it exercises power over a federal government agent acting in his official capacity, unless that official is personally, physically present within the territorial boundaries of the court's district. This argument, of course, is a plea to return to the interpretation of "jurisdiction" that was mistakenly espoused in *Ahrens v. Clark*, 335 U.S. 188 (1948)—namely, an interpretation that confused the concept of jurisdiction with the sort of territorial due process limitations on service of process endorsed in *Pennoyer v. Neff*, 95 U.S. 714 (1877). It is no wonder that the lower courts gave the government's jurisdictional argument "short shrift," Gov't Br. at 22; it has no support in the statutory

language, legislative history, this Court's current precedent, or common sense.

On its face, § 2241 does not support the government's argument that the notion of "jurisdiction" is territorially limited in the habeas context. The statute says nothing about territory or geography; nor does the statutory phrase "within their respective jurisdictions" contain any implicit territorial aspect, as it applies equally to this Court and the Courts of Appeals, all of which have always exercised "jurisdiction" far beyond state borders. The plain meaning of "jurisdiction" was in 1867, as it is today, "the power [of a court] to hear and determine" a matter in controversy. *Riggs v. Johnson*, 73 U.S. 166, 187 (1867); Black's Law Dictionary (6th ed. 1990). At the time the habeas statute was drafted, it was well-settled that a court's power over a defendant, i.e, its personal jurisdiction, was essentially a function of its ability to "serv[e] process." *Cooper v. Reynolds*, 77 U.S. 308, 316 (1870). That was exactly how the courts below read the statute, equating their "jurisdiction" under § 2241 as being coextensive with their ability to serve process on an out-of-state respondent.

Without even acknowledging the extraordinary manner in which it proposes to redefine "jurisdiction," the government argues that its territorially-restricted construction of the term is compelled by Congress's "purpose in adding . . . [the] language ['within their respective jurisdictions']" in 1867, which "was precisely to foreclose a district court from issuing process beyond the district court's territorial borders." Gov't Br. at 23. But, as the government itself acknowledges, Congress' only object was to ensure that federal courts' power *tracked the limits of their ability to serve process*, which in an era when lines of communication were fractured and slow and travel difficult, was generally limited to territorial borders out of fairness concerns. There is simply nothing in the legislative history that can fairly be read to suggest that Congress's "purpose" in adding that term was to

create the sort of territorial "jurisdiction," unique to habeas, that the government suggests, or to freeze this construct of habeas "jurisdiction" even as service of process restrictions continued to evolve and the "power and authority" of the federal courts expanded in all other areas of the law. *See Ahrens*, 335 U.S. at 206 (Rutledge, J., dissenting).

Certainly, if Congress wanted to impose for all time strict territorial limits on the habeas jurisdiction of federal courts, it would not have chosen the word "jurisdiction," which has never had a single, precisely defined or immutable signification in legal parlance. *See Costello v. United States*, 365 U.S. 265, 287 (1961) ("Among the terms of art in the law, 'jurisdiction' can hardly be said to have a fixed content."). By borrowing a term of art "in which [is] accumulated the legal tradition and meaning of centuries of practice, [Congress] presumably kn[e]w[] and adopt[ed] the cluster of ideas that were attached." *Molzof v. United States*, 502 U.S. 301, 307 (1992). In fact, the legislative history documents that Congress was well aware of the mutability of federal courts' "jurisdiction," and nonetheless declined to give this term one fixed meaning, much less the static, territorially-limited definition proffered by the government.[2]

To the extent that Congress had a deeper motive for adding the phrase "within their respective jurisdictions," it was not to

---

[2] *See* Cong. Globe 39th Cong., 2d Sess. 899 (1867) (House of Representatives' discussion regarding the Senate's amendment adding the "within their respective jurisdictions" language):

> "MR. COOK. I move that the House concur in the amendment.
>
> "MR. WRIGHT. I would ask whether anybody in this House, when he gives his vote on these amendments, knows what he is voting upon? [Laughter].
>
> "The SPEAKER. The gentleman from New Jersey is not in order. The question is on the motion to concur.
>
> "The motion was agreed to."

restrict the power of habeas courts, but to "enlarge the privilege of the writ of h[a]beas corpus, and make the jurisdiction of the courts and judges of the United States *coextensive* with all the powers that can be conferred upon them." William F. Duker, *A Constitutional History of Habeas Corpus*, 189-90 (1980) (quoting Representative Lawrence, author of the Bill in the House) (emphasis added). It is critical to remember that the "respective jurisdictions" phrase now codified in 28 U.S.C. § 2241(a) was added to the law of federal habeas corpus—as the government acknowledges with no apparent understanding of the significance of the fact—when the national courts' habeas jurisdiction was expanded beyond federal prisoners (who already had access to the writ under § 14 of the Judiciary Act of 1789) to state prisoners. *See* Act of February 5, 1867, chapter 28, § 1. This post Civil-War era measure provided federal courts with the "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States." *Id.* In passing this statute, Congress made clear that its aim was not to constrict any pre-existing authority to issue the writ but rather to grant new power "in addition to the authority already conferred by law." *Id.*; *see also Ahrens*, 335 U.S. at 206 n. 23 (Rutledge, J., dissenting). Examined in this context, the "within their respective jurisdictions" language ensured only that a habeas court would not have *broader* authority to act when issuing a writ of habeas corpus than it did when acting in any other civil case. *See Ahrens,* 335 U.S. at 204-205 (Rutledge, J., dissenting).

It is true, of course, that this Court's now-overruled decision in *Ahrens* originally read the term "jurisdiction" in the idiosyncratic way the government does here. But, as Justice Rutledge explained in his comprehensive dissent, this "formulation of rigid territorial limitations," 335 U.S. at 199, was a mistake at the time. The majority's decision permitted

"jailers [to] stand in defiance of federal judicial power, and plead either the accident of the locus of detention outside the court's territorial limitations, or their own astuteness in so selecting the place, to nullify judicial competence." *Id.* at 195. This curtailment of the power of habeas courts was, in Justice Rutledge's view, completely contrary to the language and history of the statute; it also defied the modern understanding of the term under which a lower court has jurisdiction whenever "process [could be] lawfully issued and served upon" the named respondent. *Id.* at 199-200.

Ahrens' misguided rule, confusing the term "jurisdiction" in habeas with obsolete, nineteenth-century limitations on service of process, quickly proved unworkable in the modern era, and Congress moved to undo it. With the passage of 28 U.S.C. § 2255 (in 1948) and 28 U.S.C. § 2241(d) (in 1966), Congress made sure that a "more convenient forum" namely, the court of conviction, was available to a large group of petitioners, and thereby alleviated the pressure on courts in districts housing correctional facilities. *United States v. Hayman*, 342 U.S. 205, 219 (1952); *see also Braden v. 30th Judicial Circuit*, 410 U.S. 484, 497 (1973). The government curiously argues that passage of these two statutes "would have been unnecessary if the court of appeals' understanding of habeas jurisdiction were correct," Gov't Br. at 24, but the government ignores the fact that these statutes were passed precisely because the inefficient and ill-advised rule of *Ahrens*—the rule the government seeks to reinstate—was still the law of the land at the time.

With its decisions in *Carbo v. United States*, 364 U.S. 611 (1961) and *Strait v. Laird*, 406 U.S. 341 (1972), this Court also distanced itself from the impracticable rule of *Ahrens* and signaled that habeas jurisdiction would soon be realigned

with civil jurisdiction generally.[3] In *Carbo*, the Court carved out an exception to the restrictive *Ahrens* rule for writs of *habeas corpus ad prosequendum* (a writ directing the production of a defendant or witness for trial, authorized by 28 U.S.C. § 2241(c)(5)), because nationwide use of these writs was deemed necessary "for jurisdictional potency as well as administrative efficiency." 364 U.S. at 618. Then, in *Strait*, the Court held that an army reservist could file a habeas petition in California naming his commanding officer in Indiana as the respondent. After concluding that the reservist's commanding officer was "present" in California through the chain of command, the Court in *Strait* explained that it was "well-settled" that "such [constructive] 'presence' may suffice for personal jurisdiction." 406 U.S. at 345 n.2 (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)). The Court further noted that this "concept is . . . not a novel one as regards habeas corpus jurisdiction. In *Ex Parte Endo* . . . we said that habeas corpus may issue 'if a respondent who has custody of the prisoner is within the reach of the court's process.'" *Id.* (quoting *Ex Pare Endo,* 323 U.S. 283, 307 (1944)).

Finally, in *Braden*, this Court expressly rejected its decision in *Ahrens* in its entirety, and brought jurisdiction analysis in habeas back into alignment with jurisdiction analysis elsewhere in the civil arena. Carefully reviewing the statutory language, the Court concluded, as had Justice Rutledge twenty-five years earlier, that its territorial interpretation of "within their respective jurisdictions" was unfounded. 410 U.S. at 495. The Court also observed that "Congress has indicated that a number of the premises which were thought to require th[e *Ahrens*] decision are untenable." *Id.* at 497. The Court specifically noted that its decision in *Ahrens* "rested on the view that Congress' paramount concern" was the expense and risk of transporting prisoners to different districts. *Id.* at 496. But the Court acknowledged that, with the passage of § 2255 and § 2241(d), "Congress explicitly recognized the substantial advantages of having these cases resolved in the court which originally imposed the confinement or in the court located nearest the site of the underlying controversy." *Id.* at 497. Based on these considerations, this Court rejected the rule of *Ahrens* once and for all and held that:

> [s]o long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Braden, 410 U.S. at 495. Since *Braden*, this Court has given no indication that its total rejection of *Ahrens* was misconceived; nor has Congress in any way signaled that it disapproved of this Court's mainstreaming of habeas jurisdiction principles.

The government barely acknowledges this habeas history.[4] To the extent that the government does address *Braden* and *Strait*, it dismisses these cases on indefensible grounds. With the assistance of selective citation, *see* Gov't Br. at 25 (citing to 410 U.S. at 495 and at 500), the government incorrectly

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[3] Even earlier, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), this Court entirely ignored *Ahrens* and never intimated that there was any question about a federal district court's jurisdiction to consider the habeas petition of an ex-serviceman who had been removed to Korea to face court-martial proceedings.

[4] On the issue of jurisdiction, the government affirmatively cites to one pre-*Braden* case, *Schlanger v. Seamans*, 401 U.S. 487 (1971), but the government nowhere acknowledges that this Court clarified in *Strait* that "the jurisdictional defect in *Schlanger* was not merely the [respondent's] physical absence" from the district, "*but the total lack of formal contacts* between *Schlanger*" and the district. 406 U.S. at 344 (emphasis added).

asserts that *Braden* merely reaffirmed that service of process within a territorial district is proper, and that *Braden* is distinguishable because it is a detainer case. *See* Gov't Br. at 20, 26. But if this Court's holding in *Braden* had, in fact, been so limited, this Court could have easily distinguished *Braden* from *Ahrens* and would not have repudiated *Ahrens* in its entirety. Instead, the Court carefully explained that the "inflexible jurisdictional rule" based on territorial boundaries set forth in *Ahrens* could no longer apply under any circumstance, and that it was therefore endorsing the use of "traditional principles of venue" to determine the proper choice of forum in habeas cases. *Braden*, 410 U.S. at 500.

Likewise, the government fails in its attempt to distinguish *Strait* on the grounds that it (1) only applies to a limited class of cases—either those where the petitioner is nominally in custody or where the petitioner is an unattached reservist (the exact boundaries of this supposed limitation are unclear), and (2) only expands jurisdiction to reach the place where the "effects of custody in fact were felt" by the petitioner. Gov't Br. at 26. Nothing in *Strait* supports the government's convoluted interpretation of the Court's holding, which is also irreconcilable with *Strait's* reliance on *Ex Parte Endo* (*see* p. 8, *supra*). In any event, it is completely illogical to argue that habeas petitioners who are physically detained should be subject to more strict "jurisdictional" rules than petitioners who are only nominally in custody.

Just as remarkable as its disregard for the relevant precedent and the history of habeas law generally, is the government's failure to explain why this Court should regress to a mistaken interpretation of "jurisdiction" that thwarted Congressional intent and was ultimately rejected because it was incompatible with modern law and modern realities.[5] No

[5] The only remotely relevant concern raised by the government is that, without territorial limits, more than one district court might have habeas jurisdiction, Gov't Br. at 23, but this is commonplace in the civil context, and, as this Court noted in *Braden*, 410 U.S. at 499 n.15, is easily resolved with the application of venue principles, *see* Section IV *infra*.

rational basis for the government's proposal exists, given: (1) the manner in which modern transportation and communication have greatly reduced the burdens of all inter-jurisdictional litigation; (2) the reality that all government officials sued in their official capacities have at their disposal a phalanx of local Department of Justice (DOJ) attorneys to defend them in any judicial district in the country; and (3) the absurdity of any assertion that it would be burdensome for the United States, the real party in interest, to be required to defend its actions in any Article III court.

In sum, the government's proposal to construe the statutory term "jurisdiction," in § 2241 cases alone, as restricting the exercise of a district court's authority to its territorial boundaries, has no basis in law or logic.

B. The Government's "Single-Respondent-Immediate-Physical-Custodian" Proposal Is A Conceptually Incoherent Construct That Has No Statutory Foundation, Relies On An Obsolete Notion of "Custody," And Is Inconsistent With The Modern Focus On Procedural Practicalities And Functional Pleading.

Just as the government seeks to read the word "territorial" into § 2241's discussion of "respective jurisdictions," it insists on adding the words "immediate" and "physical" to the provisions that deal with naming a respondent. Once again, this effort to graft requirements onto the habeas statutes bears no relationship to their actual language, this Court's precedents, or modern rules of civil procedure. Equally problematic, the government's rule is conceptually incoherent and will often lead to a fruitless search for an imaginary, single "custodian," when the real party in interest

is the United States government, who will always be represented by a local branch of DOJ.

Although the government tries to sell its "immediate physical custodian" proposal as a simple rule that is easily applied, the concept of "immediate physical custodian" does not withstand close scrutiny and will only cause judicial headaches if adopted by this Court. *See, e.g., Roman v. Ashcroft*, 340 F.3d 314, 320, 323 (6th Cir. 2003) (holding, inconsistently, that the Attorney General cannot be named as respondent because he does not have "actual physical custody" of petitioners, but that the "immediate physical custodian" is the Immigration and Naturalization Service (INS) District Director, not the warden of the detention facility); *see also Eisel v. Secretary of the Army*, 477 F.2d 1251, 1258 (D.C. Cir. 1973) (questioning whether it is possible to "grant substance to the vague concept of 'immediate custodianship'"); Megan A. Ferstenfeld-Torres, *Who Are We to Name? The Applicability of the "Immediate-Custodian-As-Respondent" Rule to Habeas Claims under 28 U.S.C. § 2241*, 17 Geo. Immigr. L. J. 431, 460-68 (Spring 2003) (explaining why the concept of an "immediate custodian" is a "hopeless anachronism").

The government itself provides three distinct definitions for the fictitious entity it labels the "immediate physical custodian": (1) the person "with day to day physical control over the detainee"; (2) the person "best situated to produce . . . the body of the person detained if necessary"; and (3) "the warden or Commanding Officer of the facility" in which the petitioner is physically confined. Gov't Br. at 17, 19. But given the modern reality of government bureaucracy, this description captures, *at least*, three different people. In the case of a § 2241 petitioner housed in a federal prison facility, the Bureau of Prisons (BOP) employees with "day to day physical control" will not be the same people who would be responsible for bringing the petitioner to court (who would presumably be agents of the United States Marshals Service,

see 18 U.S.C. § 3621(d)), and the BOP warden is yet another person entirely.[6] Although Mr. Padilla is in a naval brig, not in a BOP facility, it seems highly unlikely that the United States Navy requires Commander Marr, who the government identifies as Mr. Padilla's "immediate physical custodian," Gov't Br. At 21 to wear the three hats of jailer, transporter, and warden.

More importantly, the relevant entity in the federal bureaucracy for habeas purposes is not *the* person who can "produce the body" in court or who has "day to day control" over the petitioner, on either an immediate or supervisory level, but *any* person with the legal authority to ensure release. The government admits that even the imaginary solitary entity it dubs the "immediate physical custodian" would not have this power, *see* Gov't Br. at 19 ("*no* prison warden or facility commander has independent authority to determine the duration of a detainee's confinement"), and, in so doing, concedes that the act of naming the "single-respondent-immediate-physical-custodian" is an empty formalism. *See Eisel*, 477 F.2d at 1262 (where "true 'jailer' is that faceless amalgam of decision-making process known as the 'bureaucracy,'" it is senseless to "trace through the baroque interior of the petitioners' cases" to identify one "particular decision-maker as their custodian").

Meaningless formalism though it is, the government incorrectly asserts, as it does in its jurisdictional argument, that its "single-respondent-immediate-physical-custodian" rule is "dictated" by statutes—in this instance 28 U.S.C. §§ 2242 & 2243. *See* Gov't Br. at 17, 19. First, none of the

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[6] The matter is complicated still further when a facility is being paid to house the petitioner, and the administrator of the facility has no legal control over the fact or duration of confinement. In such cases, some courts have held that the "immediate-custodian" label encompasses a legal "custodian." *See, e.g., Roman*, 340 F.3d at 320 ("immediate physical custodian" is the INS District Director).

words—"immediate," "physical" or "custodian"—appear anywhere in the statutes cited by the government. Rather, § 2242 requires that the petitioner "allege . . . the name of the person who has custody over him and by virtue of what claim or authority, if known"; and § 2243 provides that the writ of habeas corpus "shall be directed to the person having custody of the person detained." Second, as this Court has explained, the habeas statutes do not even define the term of art "custody," *see Jones v. Cunningham*, 371 U.S. 236, 238 (1963) ("the statute does not attempt to mark the boundaries of custody"); *cf. Peyton v. Rowe*, 391 U.S. 54, 64 (1968) (meaning of "custody" under § 2241 "is not free of ambiguity"); *see also* Duker, *supra*, at 288 (the meaning of "custody," has been wholly a product of "judicial determination"). Nor do the statutes specify the identity of any "person" having custody, much less give any indication that the only proper respondent is the "immediate physical custodian." Third, any minimum requirement that a habeas petitioner name "the person" with "custody" over him "if known," 28 U.S.C. § 2242, is a far cry from creating a requirement that the petitioner name *only* that "person," even if the term "person" could permissibly be limited to the singular. Such a statutory interpretation is foreclosed, however, by 1 U.S.C. § 1, which expressly provides that "words importing the singular include and apply to several persons, parties or things."

Not only is the government's "single-respondent-immediate-custodian" rule devoid of statutory support, it also has no support in this Court's modern precedents which have, instead, read the habeas statutes to incorporate a functional concept of "custody" based on legal restraint whereby the "custodian" is defined as *anyone* with the power to set the petitioner free. *See* pp. 16-19 *infra*. Ignoring these developments in the law, the government reaches back to *Wales v. Whitney*, 114 U.S. 564 (1885), to provide both the mandate for its "single-respondent-immediate-physical-custodian" proposal and the definitive interpretation of "custody."

Gov't Br. at 17. With respect to the former, the government's reliance on *Wales* is misplaced; *Wales* contains no discussion of, and has nothing do with, rules for naming the proper respondent.[7] Indeed, in *Wales*, the Court made no comment about the fact that the Secretary of the Navy was named as respondent; instead, it questioned whether Wales, who was awaiting a court martial and had been directed to remain in the city limits of the District of Columbia, was in *anyone*'s custody. The term "immediate" was used in the context of a discussion about whether Wales faced a present—as opposed to an anticipated—physical restraint. Because the Court found that Wales had not yet been subject to any "physical restraint," it held that he could not seek habeas relief. 114 U.S. at 569. Thus, in essence, *Wales* was about the ripeness of a habeas petition.

The government's effort to rely on *Wales* as this Court's last word on the meaning of "custody" likewise fails. In this respect *Wales* was expressly overruled by *Hensley v. Municipal Court, San Jose-Milpitas Judicial District*, 411 U.S. 345, 350 n.8 (1973), and *Hensley* is but one of a myriad of twentieth-century habeas cases (to which the government pays little heed) in which this Court has deliberately moved away from a formalistic interpretation of "custody" toward a functional approach directed at whether the petitioner is subject to any legal restrictions which the named respondent is capable of eliminating. *See, e.g., Garlotte v. Fordice*, 515 U.S. 39, 42 (1995) (petitioner serving consecutive state

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[7] No other, more recent decision from this Court provides the government with a foundation for its pleading proposal. Even in *Ahrens*, arguably the high-water mark of this Court's adherence to mechanistic procedures in habeas, this Court did not hold that there was only one proper respondent to a habeas petition, and said nothing about any requirement that the petitioners name their "immediate physical custodian." 355 U.S. at 198-99 (Rutledge, J., dissenting).

sentences is "in custody" for the purpose of challenging sentence, now expired, which ran first); *Carafas v. LaVallee*, 391 U.S. 234 (1968) (petitioner whose sentence had expired was "in custody" because of adverse consequences that continued to flow from the fact of his conviction); *Jones*, 371 U.S. at 243 (paroled prisoner was "in custody" and parole board was a proper respondent); *see generally*, Duker, *supra*, at 287-296.

In the course of its reinterpretation of the term "custody," this Court has also made clear that the "concept[] of [a] custodian" is "sufficiently broad" to allow persons in a chain of command to be named as habeas respondents and to account for the practical realities of the case. *Strait*, 406 U.S. at 345-46. In other words, just as this Court has shifted to an interpretation of "custody" equated with legal restraint, it has shifted to an understanding of "person having custody" as someone with the legal authority to order the petitioner's release. Thus, in *Quarles*, for example, this Court did not question the exercise of habeas jurisdiction in a case brought by a serviceman who was challenging his detention in Korea but who named as respondent the Secretary of the Air Force, not his immediate "on-site" jailer or the local military commander. 350 U.S. 11.

Nowhere is this Court's focus on practicalities (and its disinterest in the type of formulaic pleading rule the government proposes) more apparent than in *Ex Parte Endo*. Dismissing the fact that no individual respondent had ever appeared in the proceedings in the lower courts, this Court in *Endo* indicated that it was satisfied that the federal government—which had been represented in the district court by the local United States Attorney's Office, and in the Supreme Court by the Solicitor General's Office—had

opposed the petition.[8] 323 U.S. at 307. Moreover, by accepting the government's representation that "the Secretary of the Interior or any official of the War Relocation Authority" would comply with the Court's order, this Court (and the government itself) acknowledged that there was no inherent significance in naming the turnkey as the respondent to the petition; the salient question was whether someone with the legal authority to release the petitioner was before the Court. *Id.* at 304-05.

Undoubtedly, the government will try to argue that each of these cases is an exception. If so, a more precise articulation of its proposed rule must be that a petitioner is required to name his "immediate physical custodian" (whatever that means) *unless* the petitioner is not "in physical custody"; or is outside the territory of the United States; or has been transferred after filing. This already unwieldy amalgam of exceptions begins to swallow the rule, however, when one looks beyond *Strait*, *Quarles*, and *Endo* and notes the number of cases where this Court has paid no attention whatsoever to the fact that the respondent was clearly not a person who could be characterized as an "immediate physical custodian."[9]

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[8] Indeed, no party in *Endo* had ever been served with process. 323 U.S. 307. Thus, *Endo* exemplifies that, in habeas as in the civil arena, jurisdiction is the court's power to hear the case, *see* p. 4 *supra*, and, although this power generally runs along the lines of service of process, even that is not always the case.

[9] *See, e.g.*, *Garlotte v. Fordice*, 515 U.S. 39 (1995) (naming Governor of Mississippi); *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995) (naming California Department of Corrections); *Wainwright v. Greenfield*, 474 U.S. 284 (1986) (naming Secretary of Florida Department of Corrections); *Middendorf v. Henry*, 425 U.S. 25 (1976) (naming Secretary of the Navy); *Braden*, 410 U.S. 484 (naming 30th Judicial Circuit of Kentucky); *Schlanger v. Seamans*, 401 U.S. 487 (1971) (naming Secretary of the Air Force); *Parisi v. Davidson*, 396 U.S. 1233 (1969) (naming Secretary of the Army); *Burns v. Wilson*, 346 U.S. 137 (1953) (naming Secretary of Defense).

Furthermore, the existence all of these "exceptional" cases proves that there is no talismanic quality to naming an "immediate physical custodian."

Given that the government's nonsensical pleading proposal has no support in the habeas statues or this Court's recent precedent, the burden is on the government to explain why such a rule is now necessary or desirable. The government is silent on this point, presumably because there is no rational explanation for such a rigid rule in this day and age. After all, a modern § 2241 petition is, in reality, not a suit against any individual named respondent, but a suit against the United States. *Cf. Cheney v. United States District Court for the District of Columbia*, 124 S.Ct. 1391, 1395 (2004) (Scalia, J. in Chambers). The respondent is named in his or her official capacity; does not appear in court or hire private counsel; and is represented by the local United States Attorney's Office and ultimately by DOJ. Indeed, DOJ is put on notice of every suit against a government official. *See* Fed. R. Civ. P. 4(i). In this context, it is absurd to require courts to expend their precious time to determine if the petitioner has named the single, "correct," "immediate physical custodian." Likewise, it is senseless and unjust to deny or delay habeas relief on a potentially meritorious claim simply because the petitioner has named the "wrong" federal government respondent.

In short, the government's effort to impose a "single-respondent-immediate-physical-custodian" pleading rule in habeas cases has no foundation in the statutory language, this Court's precedents, or modern practical realities. To the contrary,

> [t]he same principle which forbids formulation of rigid jurisdictional limitations upon the use of this prerogative writ in other respects . . . forbids limiting those who may be called upon to answer for restraints they unlawfully impose by technical niceties of the law of principal and agent, superior or subordinate in public authority, or immediacy or remoteness of the incidence of the authority or power to restrain.

Ahrens, 335 U.S. at 199 (Rutledge, J., dissenting).

II. THIS COURT LONG AGO ABANDONED, IN BOTH HABEAS AND CIVIL LITIGATION GENERALLY, THE SORT OF MECHANISTIC PROCEDURAL RULES PROFFERED BY THE GOVERNMENT.

The government's mechanistic proposals not only lack support in the habeas statutes but also are completely out of step with the past century of developments in civil and habeas law. In habeas, as in the civil world generally, the Court and Congress jointly have dispensed with strict territorial limits on service of process and formulaic pleading requirements, procedures that may once have been founded in legitimate policy considerations but have no relevance today. The government's proposals completely ignore these developments and fail to confront the controlling precedents from this Court that are of a piece with this overwhelming modernizing trend.

A. Modern Reforms In Civil Procedure Have Minimized The Importance Of Geographic Boundaries And Liberalized Pleading Rules.

Modernization in the civil arena is best captured by the Federal Rules of Civil Procedure, which were promulgated by this Court and Congress to promote fairness and efficiency by "get[ting] away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); *see also* Fed. R. Civ. P. 1. Volumes have been written about the reforms assembled in the Federal Rules, but of particular interest in this case are the reforms that loosed the power of

the courts from territorial boundaries and refocused pleading rules (especially in the context of suing the government) on identifying the real party in interest.

Reforms in service of process expanded courts' power beyond geographic borders. Long ago, a court had to have physical control over the defendant both to initiate a lawsuit and to issue a judgment.[10] In the horse-and-buggy era, territorial boundaries were a brightline estimate of the limits of a court's ability to exercise power efficiently and fairly; with the advent of the automobile and telephone, however, these territorial restrictions became arbitrary limitations. Rule 4 of the Federal Rules of Civil Procedure and other similar state rules and long-arm statutes gradually lifted previous restrictions on service of process to reflect this new reality.[11] Such changes paved the way for this Court in *International Shoe,* 326 U.S. at 317, 320, to hold, once and for all, that whether process could be fairly served would no longer be assessed indirectly by relying on territorial touchstones, but directly by analyzing "minimum contacts" with the forum district.

Just as the Federal Rules freed service of process from territorial limits, they also liberalized pleading rules regarding naming defendants, "eliminat[ing] formalistic labels," Wright

[10] For example, the writ of *capias ad respondendum*—which commanded the sheriff to arrest the civil defendant and produce him in court so that he was present to answer to the complaint—was once used to initiate a civil action at common law. *See Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999); 9 W.C. Holdsworth, *A History of English Law*, 250-51, 254 (1944).

[11] *See, e.g.*, Fed. R. Civ. P. 4(i) (formerly Rule 4(d)(4) and (5)) (facilitating service on the federal government and its "Agencies, Corporations, Officers or Employees"); Fed. R. Civ. P. 4(k)(1) (formerly Rule 4(f)) (setting forth circumstances under which "[s]ervice of a summons . . . is effective to establish jurisdiction over the person of a defendant").

& Miller, *Federal Practice and Procedure* § 1601, at 6 (3d ed. 2001) (discussing Rule 19), and thereby ensuring that the real parties in interest were before the court. Provisions in two Rules—15(c)(3) and 25(d)—particularly facilitate proceeding against the government. Both rules are "responsive to the real[i]ty," *see* Fed. R. Civ. P. 15, Advisory Committee Notes, 1966 Amendments, that a suit against a federal government agency or official is ultimately a suit against the federal government itself. *See Cheney*, 124 S.Ct. at 1395; *see also Al-Marri v. Rumsfeld,* 360 F.3d 707, 709 (7th Cir. 2004) ("An official capacity suit such as this is against the office not the person"). Moreover, these two rules implicitly acknowledge the modern-day reality that our federal government is a highly-functioning bureaucracy with centralized lines of communication, and its own internal law firm. *Cf. Cheney*, 124 S.Ct. at 1395 (vice president being sued in official capacity represented by DOJ). Thus, relation back of a pleading adding a government defendant is permitted so long as notice of the action was initially provided to "the United States Attorney," his or her designee, or "the Attorney General of the United States or an agency or officer who would have been a proper defendant if named," *see* Fed. R. Civ. P. 15(c), a precondition that is satisfied when any other federal official is an original party to the suit. *See* Fed. R. Civ. P. 4(i). Similarly, the Rules provide for automatic substitution of a public officer's successor when he or she leaves office during the pendency of litigation. *See* Fed. R. Civ. P. 25(c).

B. Habeas Procedure Has Tracked And Incorporated Civil Procedure Reforms.

Reforms in habeas procedures have mirrored civil reforms. The impulse to account for modern realities always has been a part of habeas jurisprudence, *see Schlup v. Delo*, 513 U.S. 298, 319 n.35 (1995), and this Court has consistently extolled the value of eschewing formalisms and reaffirmed the importance of ensuring the relevance of the writ in the

modern world. *See, e.g., Lonchar v. Thomas*, 517 U.S. 314, 330 (1996); *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993); *Jones*, 371 U.S. at 243; *Hensley*, 411 U.S. at 350. In addition, the modernization of habeas has become increasingly intertwined with the modernization of civil procedure generally. Congress approved the application of the Federal Rules of Civil Procedure to habeas cases in 1948 by permitting amendment of a petition "as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. This Court has, in turn, made clear that the Federal Rules are generally "applicable . . . to habeas [corpus] cases," *Slack v. McDaniel*, 529 U.S. 473, 489 (2000) (applying Fed. R. Civ. P. 41),[12] unless such application would be "inconsistent with the Habeas Corpus Rules." *Woodford v. Garceau*, 538 U.S. 202, 208 (2003).

Integration of other civil law concepts into habeas litigation has further mainstreamed habeas practice. For example, this Court and Congress have acted in tandem to hone the "abuse of the writ" doctrine, largely incorporating traditional, civil *res judicata* principles. In *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991), this Court placed limits on the filing of "second or successive" habeas petition, reasoning that, just as in the civil arena, a litigant who already has had one full and fair opportunity to seek habeas relief generally should not receive a second. Congress reaffirmed this Court's application of *res judicata* principles to habeas in the Antiterrorism

[12] *See also Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring) (describing § 2254 Rule 11 as codification of principle that the Federal Rules apply in habeas); *Collins v. Byrd*, 510 U.S. 1185, 1185 (1994) (Scalia, J., dissenting) (motion to amend habeas petitions should be governed by Federal Rules); *Withrow v. Williams*, 507 U.S. 680, 696 & n.7 (1993) (Fed. R. Civ. P. 15(b) applies in habeas context); *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (Fed. R. Civ. P. 62(c) applies in habeas context); *Browder v. Dir., Dept. of Corr. of Ill.*, 434 U.S. 257, 269-70 (1978) (Fed. Rs. Civ. P. 52(b) & 59 apply in habeas context).

and Effective Death Penalty Act of 1996. *See* 28 U.S.C. § 2244(b); *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

Likewise, as in the civil arena, the Court and Congress have rejected the need for the physical presence of the petitioner in court to commence a habeas proceeding. At Common Law, "production of the body" was "indispensable" to initiate a habeas action. Ferstenfeld-Torres, *supra*, at 461 (citing Rollin C. Hurd, *A Treatise On The Right To Personal Liberty And On The Writ Of Habeas Corpus And The Practice Connected With It*, 239-40 (1876)). As time passed, however, courts moved away from requiring literal production of the petitioner and instead adopted show cause procedures, whereby a petitioner's presence was only required when an issue of fact arose. This practice was endorsed by this Court in *Walker v. Johnson*, 312 U.S. 275, 284 (1941), and then codified in 28 U.S.C. § 2243. An even more flexible provision was included in 28 U.S.C. § 2255 wherein the decision to produce the federal prisoner was left to the discretion of the court. *See Sanders v. United States*, 373 U.S. 1, 20 (1963); *Hayman*, 342 U.S. at 223.

In keeping with these civil reforms, the passage of §§ 2255 and 2241(d) further streamlined habeas procedures by effectively overruling *Ahrens* and authorizing all federal prisoners and some state prisoners seeking collateral relief from their convictions to proceed in their district of conviction. By adopting these venue provisions, Congress "made it clear that" its overriding aim was to promote efficiency and convenience. Note, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1161 (1969-70).

* * *

It was against this backdrop of modernization that this Court decided *Ex Parte Endo*, *Strait*, and *Braden*—decisions which the government mistakenly tries to characterize as insignificant anomalies, *see* Gov't Br. at 20-21, 25-26. In fact, these cases reflect the procedural changes that were

sweeping civil litigation generally: *Endo*'s refusal to give any importance to the title or location of the nominal government respondent, *see* 323 U.S. at 304-07, mirrored the changes that were occurring in the civil rules concerning suits against government actors in their official capacities; *Strait*'s focus on the jurisdictional concept of "presence," and the Court's express reliance on *International Shoe* for determining whether a court could fairly exercise power over the parties, *see Strait*, 406 U.S. at 345 n.2, was in lockstep with similar concepts in civil cases; and *Braden*'s rejection of *Ahrens'* idiosyncratic construction of "jurisdiction" in § 2241, *see* 410 U.S. at 495-500, allowed habeas courts, like civil courts, to exercise authority, just as the 1867 Congress intended, within the expanded scope their ability to serve process.

III. HABEAS FORUM LITIGATION IN D.C. IS A CASE STUDY IN THE PROFITLESS USE OF "JURISDICTIONAL" RULES.

Habeas forum questions have arisen repeatedly over the past century in the District of Columbia in § 2241 cases for two reasons: 1) there has never been a prison located within the physical boundaries of D.C. for violators of local law, and 2) D.C. is the seat of federal government. Until this Court's decision in *Ahrens*, D.C. courts employed common-sense venue analysis to beneficial effect—D.C. prisoners were able to litigate their § 2241 petitions in D.C. courts, where the bench and bar were best equipped to handle them, while other prisoners with no comparable connection to D.C. were turned away—and, after *Ahrens* was overruled, D.C. courts largely returned to this effective method of assessing choice of forum. But recently the government has tried to breathe new life into the "jurisdictional" residue of *Ahrens* that persists in D.C. case law, and D.C. prisoners are once again in danger of being barred from seeking habeas relief in D.C. courts.

More than 65 years ago, D.C. courts held that habeas law was sufficiently flexible to accommodate D.C. prisoner-petitioners in the D.C. Courts—even under the then-prevailing formalistic rules that governed all habeas cases. In *Sanders v. Allen*, 100 F.2d 717, 719 (D.C. Cir. 1938), the D.C. Circuit held that D.C. prisoners housed in Virginia could bring habeas claims in D.C. courts because their situation was "*sui generis* and . . . in no way analogous to the sentence and confinement of a prisoner convicted of a violation of a United States statute in one of the other Federal District Courts." Seven years later, the D.C. Circuit confirmed a reciprocal choice-of-forum rule with respect to federal prisoners who had no real connection or claim to D.C. In *Sanders v. Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945), the Circuit explained that a rule allowing every federal prisoner in the country to find a forum in D.C. was "without justification either in convenience or logic," and thus rejected, on essentially venue grounds, a federal prisoner-petitioner's attempt to obtain habeas relief in D.C. Continuing to lay out clear and sensible habeas venue principles for local offenders, however, the D.C. Circuit carefully contrasted this holding with the complimentary rule it had established for D.C. prisoner-petitioners, explaining once again that because the habeas forum "rule is a practical one based on common sense administration of justice," it cannot function to bar D.C. courts from resolving cases involving their own prisoners. *Id.* at 20.

Such was the state of the law when this Court decided *Ahrens*, which, just as Justice Rutledge predicted, upended the District's common-sense forum-selection system. 335 U.S. at 207 n.24. Only a few months after *Ahrens* was decided, the D.C. Circuit determined that it had to abandon the venue principles laid out its *Sanders* cases and impose, instead, a rigid rule barring all extraterritorial habeas petitions, even those brought by D.C. prisoners housed at the District's own correctional facility in Virginia. *McAffee v.*

Clemmer, 171 F.2d 131, 131-32 (D.C. Cir. 1948). Subsequently, courts in D.C. struggled with the rule of *Ahrens*. Some applied it faithfully, but appeared unhappy with the outcome. *See e.g., McAffee, supra*; *I. B. v. District of Columbia Dept. of Human Resources, Social Services Administration*, 287 A.2d 827 (D.C. 1972); *Thompson v. District of Columbia*, 158 A.2d 687 (D.C.1960). Others engaged in legal acrobatics seemingly to avoid its inefficient and unfair result. *See, e.g., Bolden v. Clemmer*, 298 F.2d 306 (D.C. Cir. 1961); *Hurley v. Reed*, 288 F.2d 844 (D.C. Cir. 1961); *Robbins v. Reed*, 269 F.2d 242 (D.C. Cir. 1959).

Not surprisingly, then, only a few months after this Court's decision in *Braden*, the D.C. Circuit quickly returned to the sensible choice-of-forum rules that it had applied prior to *Ahrens*. In *Eisel*, 477 F.2d at 1255, the Court, per *Braden*, "employed practical considerations" to re-route habeas claims by petitioners with no real connection to D.C. to the petitioners' home states. *See also Reese v. United States Board of Parole*, 498 F.2d 698, 700 (D.C. Cir. 1974); *Wren v. Carlson*, 506 F.2d 131, 133-34 (D.C. Cir. 1974). Subsequently, in *McCall v. Swain*, 510 F.2d 167, 176-77 (D.C. Cir. 1975), the D.C. Circuit re-introduced common sense venue principles to its analysis of the habeas claims of D.C. prisoners. In light of *Braden*, the Circuit held that "[v]enue considerations rather than an arbitrary jurisdictional obstacle would . . . be employed to serve the policies which underlay the *Ahrens* decision," and would, at the same time, permit D.C. prisoners to regain access to D.C. courts. *Id.*

Unfortunately, the story of D.C. habeas litigation does not end there. Anxious about D.C.'s status as the seat of the federal government and the home to many potential federal respondents, the D.C. Circuit allowed some of *Ahrens*' "jurisdictional" language to creep back into its decisions. Illustrative of the principle that easy cases make bad law, the circumstances in these cases were *Ahrens* redux—the

petitioners had no meaningful connection to D.C. other than the ability to locate some federal respondent there, and their petitions just as easily could have been transferred to another district on venue grounds, *see, e.g., Guerra v. Meese*, 786 F.2d 414 (D.C. Cir. 1986) (federal prisoners convicted in the Eastern District of New York); *Monk v. Secretary of the Navy*, 793 F.2d 364 (D.C. Cir. 1986) (marine court-martialled in California and held in Leavenworth), just as *Braden* demonstrated that *Ahrens* could have been. 410 U.S. at 500.

Since the closure of D.C.'s prison in Virginia and the transfer of D.C. felons to the custody of the BOP (*see* National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. 105-33 § 11000, codified in relevant part at D.C. Code § 24-101), the Circuit's careless use of *Ahrens*-type phraseology has come back to haunt D.C. prisoners. The government has seized upon the pseudo "jurisdictional" language from *Guerra* and *Monk* in an effort to preclude prisoners convicted and sentenced for local D.C. crimes from litigating in D.C. issues that are substantially intertwined with D.C. law and practice.

The battle over this issue was most recently joined in the D.C. Circuit case, *Stokes v. United States Parole Commission*, No. 01-5432 (argued December 8, 2003; decision pending). In 2000, Mr. Stokes was serving a D.C. sentence, imposed in 1986, in the private prison facility in Ohio to which he had been assigned by the BOP. Mr. Stokes filed a *pro se* habeas petition in D.C. challenging, on *ex post facto* grounds, the use of new, materially harsher, D.C. parole guidelines promulgated in 1997. Although the district court deemed the case properly before it, the D.C. Circuit, at the government's urging, dismissed Mr. Stokes' claims for lack of jurisdiction on the ground that the case belonged in Ohio. The Circuit subsequently vacated its order and directed full briefing, after Mr. Stokes obtained counsel. Based on the same "jurisdictional" arguments advanced in this case, the

government maintained that Mr. Stokes' case has no place in D.C. At the same time, the government utterly ignored the venue considerations discussed in *Braden* and applied in D.C., with great efficiency, for decades.

The D.C. Circuit has not yet ruled in *Stokes* case. Mr. Stokes, for his part, has now been moved by the BOP to South Carolina, and the government's latest argument is that Mr. Stokes' case belongs there. Mr. Stokes now waits to hear whether the government will succeed in barring him from invoking the Great Writ in the jurisdiction where he has access to counsel, documents, and witnesses, and where the court and counsel are familiar with the D.C. parole regulations that underlie his claim.

IV. VENUE ANALYSIS, TAILORED TO THE HABEAS CONTEXT, WILL BEST ENSURE SOUND JUDICIAL ADMINISTRATION.

As the government presents the issue, there will be habeas chaos unless this Court resuscitates an *Ahrens*-construction of jurisdiction and formulaic pleading rules long ago abandoned in every other civil context. But there is another, superior alternative to litigating § 2241 choice of forum by proxy—the consideration of venue concerns outright. Thus, the real question is what venue rules should apply to § 2241 petitions.

There will generally be only two potentially appropriate venues for habeas litigation—the place where the petitioner was subject to the legal proceedings at issue; and the place where the petitioner is incarcerated. *Braden's* choice of forum analysis in *Ahrens* provides a neat model for assessing venue in most cases: There should be a rebuttable presumption in favor of the district of incarceration where the petitioner bears the burden of establishing when and how some other proposed location represents a "more convenient forum." *Braden*, 410 U.S. at 500. Some small, but easily identifiable classes of cases, like D.C.-prisoner petitions (and other petitions from federal enclaves like the Virgin Islands,

see, e.g., Callwood v. Enos, 230 F.3d 627, 633 n. 6 (3d Cir. 2000)) will virtually always rebut the presumption, and thus, as a class, will generally require the habeas litigation to take place in the district where legal proceedings took place. In such cases, that will be the location of the most competent bench, bar and evidence. Likewise, it will rarely be efficient for a foreign court to pass judgment on a federal enclave's provincial business.

In other cases, like this one, the presumption will be rebutted by the individual facts presented—here, the inefficiency and injustice of removing an extremely unusual case from the judge and counsel who have already invested, and developed special expertise, in the legal and factual issues. As a result, New York, and not South Carolina, was unquestionably the proper forum to litigate Mr. Padilla's case. By invoking Chief Judge Mukasey's judicial powers to secure Mr. Padilla's presence in New York, the government both signaled that New York was not an inconvenient forum and integrally involved the New York Court in the process leading to Mr. Padilla's capture as an enemy combatant. Indeed, the government's decision to downgrade Mr. Padilla's legal status was apparently triggered by approaching hearings on motions in the District Court for the Southern District of New York filed by Mr. Padilla's counsel, Ms. Newman. *Padilla v. Bush*, 233 F. Supp. 2d 564, 571 (S.D.N.Y. 2002). Moreover, because Chief Judge Mukasey had appointed Ms. Newman to represent Mr. Padilla, and had observed her representation, the New York Court was uniquely situated to evaluate at least one critical issue in the case below—whether Ms. Newman had standing as Mr. Padilla's next friend.

Although it would be difficult to accuse Mr. Padilla of forum-shopping, the government is sure to object to this venue analysis generally on these grounds. Of course, no choice of forum rule can completely foreclose this possibility,

but reliance on venue principles has the advantage of not only identifying the most convenient and efficient forum for resolution of a suit but also minimizing forum-shopping by *both* parties. *See Eisel*, 477 F.2d at 1257 (warning of "inverse forum shopping" by the government); Ferstenfeld-Torres, *supra*, at 467 ("immediate-custodian" pleading rule does not address forum-shopping by the government). *Amicus* makes no claim as to the government's motives here, but it cannot have escaped the government's notice that the jurisdictional and "single-respondent-immediate-physical-custodian" rules it seeks in Mr. Padilla's case will give the government complete control—control enjoyed by no defendant in any other context—over forum-selection in all § 2241 cases. This seems especially unfair in habeas, where there may only be one forum that is convenient for the petitioner and no forum that is inconvenient for the federal government. Moreover, ceding control over choice of forum to the government is antithetical to the "grand purpose" of habeas corpus which is to "protect[] . . . individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones*, 371 U.S. at 243.

CONCLUSION

For the reasons stated above, the lower courts correctly and unanimously determined that this habeas litigation belonged in the Southern District of New York.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, Secretary of Defense,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
As Next Friend of Jose Padilla,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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State of the Union Address, *at h*ttp://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html (Jan. 29, 2002) 27

Thomas Paine, *Dissertation on First Principles of Government, in 2 The Complete Writings Of Thomas Paine* (Philip S. Foner ed., 1945) 5, 6

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) 19, 26

U.N. GAOR 3d Comm., 13th Sess., Agenda Item 32, 863d mtg. at 137 para. 17 (1958).....4, 6

U.N. Human Rights Comm., General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) 16, 17

U.S. Department of State's Annual Human Rights Report (Mar. 31, 2003), in U.S. Department of State Press Release, State Department Report Outlines Human Rights Abuses in Iraq-Powell Cites Saddam's Regime as Great Threat to Global Peace, Stability, *available at* 2003 WL 2047088.....25

INTERESTS OF AMICUS CURIAE[1]

Global Rights respectfully submits this brief in support of respondents, José Padilla and Donna R. Newman, as Next Friend of José Padilla. Both parties have consented to the filing of this brief.

Global Rights is a non-profit public interest legal organization with projects in twenty-two countries engaged in training, technical assistance, advocacy, and litigation around the world. Founded in 1978 as the International Human Rights Law Group, Global Rights provides legal assistance and information in the field of international human rights law and maintains consultative status with the Economic and Social Council of the United Nations. Global Rights' goals include the development and promotion of international legal norms, and its advocates work closely with individuals and organizations worldwide to expand the scope of human rights protections for men and women. Global Rights has represented individuals and organizations before national and international tribunals and has appeared as *amicus curiae* in numerous cases in the United States. *See, e.g., Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF ARGUMENT

Although the United States has played a central role in shaping international human rights and humanitarian law, it has disregarded its obligations under one of the principal human rights treaties it ratified and helped author, the International Covenant on Civil and Political Rights

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[1] This brief was not authored, in whole or in part, by counsel for either party. No person or entity other than the *amicus curiae*, its members, and its counsel contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

("ICCPR"), and under customary international law, by arbitrarily detaining José Padilla. Mr. Padilla is being held outside the imprimatur of law and, absent a legitimate basis for his on-going detention under present conditions, his detention is arbitrary *per se*. Moreover, by denying Mr. Padilla meaningful access to counsel and a substantive opportunity to challenge the basis of his detention, the Executive has deprived Mr. Padilla of the process due under international law.

The Court of Appeals for the Second Circuit correctly held that Article II of the United States Constitution and Congress' Authorization for Use of Military Force ("Joint Resolution") do not authorize the Executive to arrest Mr. Padilla, a U.S. citizen on U.S. soil, and then detain him as an "enemy combatant." *See Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2d Cir. 2003). In light of its long tradition of considering international law when defining the scope of detention powers during periods of conflict, in examining the breadth of an individual right, and in interpreting ambiguity in Congressional acts, this Court should not read international law to permit Article II or the Joint Resolution to support Mr. Padilla's arbitrary detention. We therefore urge the Court to affirm the Second Circuit's decision in this case.

ARGUMENT

I. INTRODUCTION

The fundamental principle of a free society is that personal liberty cannot be denied in the absence of a lawful mandate. *See Hines v. Davidowitz*, 312 U.S. 52, 71 (1941) (describing Congressional opposition to "unnecessary and irritating restrictions upon personal liberties of the individual" because those restrictions "were at war with the fundamental principles of our free government"). Arbitrary detention is anathema to the Framers' vision for the United States legal system: "[T]he practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instrument[ ] of tyranny." Alexander Hamilton, *Federalist Paper No. 84, in The Federalist Papers: A Collection of Essays Written in Support of the Constitution of the United States* 261 (Roy P. Fairfield ed. 1981); *see also Duncan v. Kahanamoku*, 327 U.S. 304, 322-23 (1946) ("[T]he founders . . . were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments.").

In this case, the President, as Executive and Commander-in-Chief, has asserted near absolute power over José Padilla in disregard of a number of basic human rights that the United States has been instrumental in developing and defending around the world. The Executive has claimed the power to deprive Mr. Padilla of his liberty indefinitely, of any meaningful assistance of counsel, of the right to know the charges against him, and of the right to a meaningful opportunity to challenge the basis of his detention. Added to this deprivation of procedural rights is the fact that until only last month, Mr. Padilla has been held largely incommunicado at a secret location, in conditions that are unknown, and for a purpose that remains secret.[2] This gross assertion of power is inconsistent with the letter and structure of international human rights and humanitarian law that the United States has

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[2] Mr. Padilla has been held largely incommunicado from the time he was taken into military custody in June 2002 until March 3, 2004 when he was permitted to meet and speak with his lawyers. The Government claimed that it allowed "[Mr.] Padilla access to counsel as a matter of discretion and military authority." News Release, Department of Defense, Padilla Allowed Access to Lawyer (Feb. 11, 2004), *at* http://www.defenselink.mil/releases/2004/ nr20040211-0341.html. The Government videotaped Mr. Padilla's meeting with counsel, stationed a member of the military for the entirety of the meeting, and photocopied all of the attorneys' notes from that meeting. *See* Phil Hirschkorn, *After 22 Months, 'Dirty Bomb' Suspect Sees Lawyers*, CNN.com, Mar. 3, 2004, *at* http://www.cnn.com/2004/LAW/03/03/ enemy.combatant.visit/.

helped to create and promulgate worldwide, in the name of liberty and justice.[3]

The prohibition on arbitrary detention in the International Covenant on Civil and Political Rights ("ICCPR"), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, and ratified by the United States on June 8, 1992,[4] is clear. The ICCPR is the binding law of the United States, and the U.S. Government abided by the prohibition on arbitrary detention for nearly a decade. Whether dealing with Soviet or Cuban spies, Iraqi Republican Guard, or persons accused of committing or conspiring to commit terrorist acts in the United States, such as Abu Omar, Timothy McVeigh and Terry Nichols, the United States has – until the attacks of September 11, 2001 – observed the ICCPR's provisions governing detention. Many of those individuals were spies and saboteurs of the highest order with heinous plots against the United States, but the Government provided them with the protections guaranteed by Article 9 of the ICCPR, including meaningful access to counsel and a meaningful opportunity to review the basis of their detentions.

The unique circumstances surrounding Mr. Padilla's detention require adherence to those provisions of the ICCPR designed to proscribe government action that would deprive individuals of their fundamental human rights. Mr. Padilla was initially apprehended in Chicago O'Hare International Airport by one of the national law enforcement entities of the

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[3] The United States played a principal role in the drafting and negotiation of the ICCPR. *See* U.N. GAOR 3d Comm., 13th Sess., Agenda Item 32, 863d mtg., at 137 para. 17 (1958) (describing comments from a U.S. representative regarding the ICCPR's prohibition on arbitrary detention).

[4] The treaty became effective in the United States on September 8, 1992, three months after the President deposited it with the United Nations Secretary General. *See* Multilateral Treaties Deposited with the Secretary General: Status as of Dec. 31, 2002, U.N. Doc. ST/LEG/SER.E/22, at 165 (2002).

U.S. Government, the Federal Bureau of Investigation. This arrest followed the issuance of a material witness warrant by a grand jury in the Southern District of New York. Subsequently, on the basis of two conclusory statements, without providing any opportunity to challenge these statements, the Executive transferred Mr. Padilla from law enforcement custody to the United States Navy for indefinite detention aboard a Naval brig as a so-called "enemy combatant." *See* Determination of President George W. Bush para. 6 (June 9, 2002); Declaration of Michael H. Mobbs para. 16 (Aug. 27, 2002) ("Mobbs Decl."); *see also Padilla*, 352 F.3d at 699–701. To our knowledge, never before in U.S. history has the Executive arrested and detained a U.S. citizen on U.S. soil, then transferred him into the care of the Secretary of Defense as a so-called "enemy combatant" *without* full Congressional authorization and *without* any meaningful opportunity to challenge the basis of detention.

As this Court noted a quarter of a century before the United States ratified the ICCPR, our defense of this country includes the defense of its democratic and humanitarian values: "Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart." *United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").

After taking a lead role in the development of international human rights law and, in particular, the ICCPR, the U.S. Government now challenges the applicability of that law to the detention of Mr. Padilla. Since the Second World War, the United States maintained the good fortune of not sustaining a major attack on its mainland. Military and economic strength, combined with an arsenal of foreign policy tools, has kept America's enemies in check. Among those policy tools have been the promotion of democracy, the rule of law, and the protection of human rights, combined with a keen awareness of reciprocity. *See* Thomas Paine,

Dissertation on First Principles of Government, in 2 *The Complete Writings Of Thomas Paine* 588 (Philip S. Foner ed., 1945) ("He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."). But in the face of the September 11, 2001 attacks, the Government has disregarded the ICCPR and customary international law's prohibition on arbitrary detention.[5] The Government's haste to act has also dangerously undermined the fundamental foreign policies that have been the foundation of our relations with the world community. Global Rights therefore urges steadfast adherence to the rule of law.

II. The Government's Detention of Mr. Padilla Is Arbitrary under International Law.

The Government's detention of Mr. Padilla is arbitrary under international law because the ICCPR, which is binding on the United States, provides that "[e]veryone has the right to liberty and security of person" and "[n]o one shall be subjected to arbitrary . . . detention." ICCPR art. 9(1). *See* U.N. GAOR 3d Comm., 13th Sess., Agenda Item 32, 863d mtg. at 137 para. 17 (1958) (discussing argument from a U.S. representative to include "arbitrary" rather than "illegal" or "unjust" in Article 9 of the ICCPR because "the word 'arbitrary' embodied both ideas and indeed went appreciably beyond them").[6] Accordingly, "[n]o one shall be deprived of

[5] Following the Government's argument that it should be permitted to hold the Guantanamo Bay detainees indefinitely, the Court of Appeals for the Ninth Circuit considered whether the Government was also free to torture or summarily execute the detainees. *See Gherebi v. Bush*, 352 F.3d 1278, 1299-1300 (9th Cir. 2003). The Court stated that "the government advised [ ] that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees." *Id.* ("To our knowledge . . . the U.S. government has never before asserted such a grave and startling proposition.").

[6] In interpreting the treaty, the Court should consider the intent of the

his liberty except on such grounds and in accordance with such procedures as are established by law." ICCPR art. 9(1). The law does not recognize the term "enemy combatant" as legal grounds for the indefinite and unchallengeable detention of Mr. Padilla. Moreover, the Government has failed to notify Mr. Padilla of the charges against him, as required by Article 9(2) of the ICCPR and customary international law. Finally, the Government has denied Mr. Padilla a meaningful opportunity to challenge the basis of his detention, as required by Article 9(4) of the ICCPR and customary international law.

A. No Law Establishes Procedures for Detaining Mr. Padilla as a So-Called "Enemy Combatant."

The Government maintains that Mr. Padilla's detention is legitimate and outside judicial review solely because they have designated him as an "enemy combatant." Determination of President George W. Bush para. 6 (June 9, 2002); (Mobbs Decl. para. 16); Pet'r's Br. at 27-49. However, the term "enemy combatant" is both undefined and unrecognized at law.

The Government relies exclusively on *Ex parte Quirin*, 317 U.S. 1 (1942), as the lone source of law to support its classification of Mr. Padilla as a so-called "enemy combatant." *See* Pet'r's Br. at 6, 7, 14, 28, 30-34, 42, 47, 49. Other than *Quirin*, no source of U.S. or international law, including the laws of war,[7] references the term "enemy

parties to the treaty and their post-ratification understanding of the treaty. *See Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (stating that the Court has "traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties").

[7] The laws of war were largely incorporated into the Geneva Conventions after World War II. Neither the Third nor the Fourth Geneva Convention, ratified and binding on the United States in instances of declared wars and armed conflicts, refer to the Government's newly invented classification "enemy combatant." *See* Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, arts. 4-5, 75 U.N.T.S. 135 (entered into force

combatant." The Government's reliance on *Quirin* is misplaced, as the Court in that case did not create a new and completely unprivileged class of combatants. Rather, the Court used the term "enemy combatant" when noting the difference between lawful and unlawful combatants.[8]

Furthermore, neither this Court's use of the term "enemy combatant" in *Quirin* nor adherence to the White House Counsel's "enemy combatant" designation procedures, *see* 150 Cong. Rec. S2701, S2703–S2704 (daily ed. Mar. 11, 2004) (reprinting Alberto Gonzales, White House Counsel, Remarks before the American Bar Association's Standing Committee on Law and National Security, (Feb. 24, 2004)), permits the Executive to strip the so-deemed "enemy combatants" of all procedural rights. Notably, while borrowing the term "enemy combatant" from *Quirin* to describe Mr. Padilla, the Government fails to address the difference in process afforded to the *Quirin* saboteurs and Mr. Padilla. In *Quirin*, the Government formally notified the Nazi saboteurs of the charges against them, allowed them

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with respect to the United States Feb. 2, 1956) ("Third Geneva Convention"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force with respect to the United States Feb. 2, 1956) ("Fourth Geneva Convention"). After ratification and deposit of the treaty instrument, the Third and Fourth Geneva Conventions took effect with regard to the United States on February 2, 1956.

[8] Detainees, to whom the Third and Fourth Geneva Conventions apply and whom those Conventions nevertheless do not protect, are often referred to as "unlawful combatants." Before those Conventions were opened for signature, this Court defined the terms "lawful combatant" and "unlawful combatant." *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942) ("By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.") (footnote omitted).

representation by counsel, tried them before military tribunals at the time they filed their petitions for writ of habeas corpus, and afforded them the opportunity to challenge the Government's evidence against them. *See Ex parte Quirin*, 317 U.S. at 6-10. That abundance of process provided to the *Quirin* saboteurs stands in stark contrast to Mr. Padilla's complete denial of process.

Since *Quirin* is unable to support the Government's invented classification of "enemy combatant," and there is no other legal support for this imagined term, the detention of Mr. Padilla violates the well-settled principle of customary international law that "[e]very person in enemy hands must have some status under international law." *Commentary Vol. IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (Jean S. Pictet 1958) ("There is no intermediate status; nobody in enemy hands can fall outside the law.") (emphasis omitted).

Consistent with that principle is the express requirement of the ICCPR, a treaty ratified by and thus binding on the United States,[9] that "no one shall be deprived of his liberty on such grounds and in accordance with such procedures as are established by law." ICCPR art. 9(1). At the time the Government transferred Mr. Padilla into the custody of the Department of Defense, no law established procedures or grounds for detaining him or anyone else as a so-called "enemy combatant." The Court of Appeals for the Second Circuit correctly held that neither the Authorization for Use of

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[9] Treaties are agreements among sovereign powers that, once ratified by the United States, are the supreme law of the land. *See* U.S. Const. arts. II, § 2 & VI, cl. 2; *Zicherman*, 516 U.S. at 226 (stating that "a treaty ratified by the United States is . . . the law of this land") (citing U.S. Const. art. II, § 2); Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. Int'l L. & Pol. 35, 42 (1997) (stating that "domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.").

Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("Joint Resolution"), nor the Executive's constitutional powers authorized Mr. Padilla's detention. *See Padilla*, 352 F.3d at 699, 710-715, 722-724. Therefore, the White House Counsel's procedures for designating an enemy combatant, purportedly authorized under Article II and the Joint Resolution and publicly announced nearly two years after Mr. Padilla was so designated, *see* 150 Cong. Rec. at S2703–S2704, lack any legal authority.[10]

Likewise, customary international law[11] flatly prohibits arbitrary detention: "A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention." Restatement (Third) of the Foreign Relations Law of the United States § 702(e) (1987) ("Restatement (Third)"). *See, e.g., Alvarez-Machain v. United States*, 331 F.3d 604, 621 (9th Cir.) (en banc) (holding that detention is "arbitrary" and an abridgement of human rights when "it is not pursuant to law; it may be arbitrary also if it is

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[10] The United Nations Human Rights Committee and several international legal scholars have noted that detentions justified under domestic law nevertheless may be arbitrary and unlawful under international law. *See* Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. h (1987) (stating that detention is arbitrary "if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person") (internal quotations and citation omitted). Thus, if the Government's interpretation of the existing U.S. laws, *e.g.*, Article II and the Joint Resolution, that purportedly authorize Mr. Padilla's detention is arbitrary under international law, then his detention may be characterized as unjust.

[11] Customary international law, or the law of nations, "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) § 102(2); *see Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C.Cir. 1985) (noting that the terms "customary international law" and "law of nations" are interchangeable); *see also United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003) ("Customary international law is comprised of those practices and customs that States view as obligatory and that are engaged in or otherwise acceded to by a preponderance of States in a uniform and consistent fashion.").

incompatible with the principles of justice or with the dignity of the human person") (citation omitted), *cert. granted*, 124 S. Ct. 807, 821 (2003); *Al-Nashif v. Bulgaria*, 36 Eur. H.R. Rep. 37 para. 94 (2002) ("National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved. . . .").

Neither the ICCPR nor customary international law creates an exception from this prohibition on arbitrary detention for the Executive's invented "enemy combatant" classification – a label apparently contrived as a rationalization to deny detainees any rights due under the law. Thus, the President cannot declare through Executive fiat that a certain class of detainees is immune to the prohibition on arbitrary detention imposed by the ICCPR and customary international law.

B. The Executive Has Deprived Mr. Padilla of His Right to Be Notified of the Legal Basis of His Detention.

The Executive's contrived "enemy combatant" classification does not exist at law; beyond that the Government failed to define it at the time Mr. Padilla was arrested. This predicament puts Mr. Padilla in an impossible legal position: Even if he were afforded the opportunity to challenge the basis of his detention, he could not do so in the absence of a standard defining "enemy combatant." By not providing Mr. Padilla with a definition of the term "enemy combatant" at the time he was arrested, the Executive has failed to notify him of the legal basis for his detention.

This failure to notify Mr. Padilla of the charges against him at the time he was arrested violates Article 9(2) of the ICCPR, which requires that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." ICCPR art. 9(2). When the Government released Mr. Padilla from the custody of the Department of Justice, which was

holding him as a material witness, it detained him anew under a classification undefined at law and thus violated Article 9(2) of the ICCPR.

Ignoring the clear requirements of the ICCPR, the Government attempts to find support for its spurious "enemy combatant" designation by exaggerating a passing reference to the term in *Quirin*, a Supreme Court decision that pre-dates the United States' ratification of the ICCPR by nearly a half century. *See* Pet'r's Br. at 28; *Quirin*, 317 U.S. at 1. Although the Court used the term "enemy combatant" in its discussion of wartime detainees, the Court never defined it. Instead, the Court invoked the term to characterize "offenders against the law of war." *Quirin*, 317 U.S. at 31 (explaining that an offender against the law of war is, *inter alia*, "an *enemy combatant* who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property") (emphasis added). The Government incorrectly stated that in *Quirin*, the Court recognized that "the 'universal agreement and practice' under the 'law of war' holds that enemy combatants are 'subject to capture and detention . . . by opposing military forces.'" Pet'r's Br. at 28 (citing *Quirin*, 317 U.S. at 30-31); *see also* Pet'r's Br. at 33. Rather, the *Quirin* Court stated that "unlawful" – not enemy – combatants are "subject to capture and detention . . . by opposing military forces." *Quirin*, 317 U.S. at 30-31. Thus, neither *Quirin* nor any other source of law – U.S. or international – appears to provide Mr. Padilla or this Court with any definition of "enemy combatant." The Court's lone reference to the term provides Mr. Padilla with insufficient notice of the legal basis of his detention. In violation of Article 9(2) of the ICCPR, the Government has failed not only to define the term, but also to provide Mr. Padilla at the time of his arrest with a set of criteria or a standard that triggers its applicability to a particular detainee.[12]

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[12] The White House Counsel's procedures for designating "enemy combatants" state that the Executive may designate U.S. citizens as enemy combatants, whether they were arrested on an active field of combat or on U.S. soil. *See* 150 Cong. Rec. at S2703. The procedures define the term "enemy combatant" for those citizens arrested on U.S. soil as "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts...." *Id.* at S2704. But the White House Counsel publicly announced this definition nearly two years after Mr. Padilla's arrest and designation as an "enemy combatant." This definition comes far too late to satisfy the notification requirements of Article 9(2) of the ICCPR. Moreover, the White House Counsel has not provided a definition either for "enemy combatants" generally or for "enemy combatants" arrested outside the United States. Instead, the White House Counsel stated that Yaser Esam Hamdi, whom the Government captured in Afghanistan and designated an enemy combatant, "presents a relatively easy case" and then explained that a "U.S. military screening team confirmed that [Mr.] Hamdi met the criteria for enemy combatants." *Id.* at S2703. However, the White House Counsel did not establish those criteria in his procedures, and Mr. Hamdi clearly does not meet the standard established for U.S. citizens arrested in the United States because Mr. Hamdi did not "enter this country bent on hostile acts." *Id.* at S2704 (quoting *Quirin*, 317 U.S. at 38).

The Executive's failure to provide Mr. Padilla with notice of the legal basis for his detention is also unlawful under customary international law. *See* Restatement (Third) § 702 cmt. h (providing that detention is arbitrary if it "is not accompanied by notice of charges"); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Jan. 23, 1979, 1125 U.N.T.S. 3, art. 75(3) (stating that "[a]ny person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken").

As discussed previously, widespread state practice can evidence the establishment of a custom or norm in international law. *See supra* note 11 and accompanying text. Explaining the import of Article 5(2) of the European Convention on Fundamental Freedoms and Human Rights ("ECHR"), the European Court of Human Rights noted that Article 5(2) "contains the elementary safeguard that any

person arrested should know why he is being deprived of his liberty." *Fox, Campbell & Hartley v. United Kingdom*, App. Nos. 12244/86, 12245/86, 12383/86, 13 Eur. H.R. Rep. 157, 170 (1990), *available at* 1991 WL 838719. Further, the European Court stated that "any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4" of Article 5 of the ECHR. *Id.*; *see also O'Driscoll v. Sec'y of State for the Home Dep't*, Case No: CO/913/2002 para. 24 (Q.B. Div'l Ct. 2002), *available at* 2002 WL 31523307 (agreeing with the European Court of Human Rights that "to be properly prescribed by law an offence must be adequately accessible, and it must be formulated with sufficient care to enable the citizen to regulate his conduct, if need be with appropriate advice") (citing *Sunday Times v. United Kingdom*, 2 Eur. H..R. Rep. 245 (1979). The European Court of Human Rights also has required judges presiding over bond determination hearings to make sure that individuals are detained only upon a careful review of the legal standard for detention. *See TW v. Malta,* App. Nos. 25644/94, 25642/94, 29 Eur. H.R. Rep. 185, 189 para. 41 (2000) (requiring the judge to review the circumstances of detention by referring to legal criteria to determine whether there are reasons to justify detention and to order the release if there are no such reasons). In Spain, the authorities must immediately inform those arrested for terrorist crimes of the reason for their arrests. *See* TC, May 16, 2000 (S.T.C. 127). Moreover, at least one U.S. federal court of appeals has found that detention is arbitrary if executed without an adequate explanation of the legal basis for the detention. *See Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (stating that "[d]etention is arbitrary if 'it is not accompanied by notice of charges,'" among other things) (quoting Restatement (Third) § 702 cmt. h and citing ICCPR art. 9).

By depriving Mr. Padilla of the right to notice of the legal basis of his detention, the Executive is arbitrarily detaining Mr. Padilla under international law.

C. The Government's Detention of Mr. Padilla Is Arbitrary under International Law Because the Government Has Deprived Him of a Meaningful Opportunity to Challenge the Basis of His Detention.

In addition to detaining Mr. Padilla under a classification that is neither authorized nor defined, the Government also has arbitrarily detained Mr. Padilla by not providing him with a meaningful opportunity to challenge the basis of his detention. This opportunity, widely recognized as a fundamental right, is required by Article 9(4) of the ICCPR and by customary international law.

Regardless of how the Government classifies or characterizes Mr. Padilla, he is entitled to the protections of the ICCPR, providing that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR art. 9(4). At least one U.S. federal court of appeals recently noted that Article 9(4) of the ICCPR requires the United States to subject Executive detention to judicial review. *See Gherebi*, 352 F.3d at 1283 n.7 (quoting ICCPR art. 9(4)).

Mr. Padilla's detention for nearly two years without the opportunity to challenge the Government's characterization of his status deprives him of the fundamental right to liberty and security embodied in Article 9(4). In direct contravention of its obligations under the ICCPR, the Government has denied Mr. Padilla "proceedings before a court" by precluding any testimony in refutation of his detention and by failing to notify him of the legal basis of his detention. *See, e.g., Morgan v. United States,* 304 U.S. 1, 18 (1938) (stating that the right to a "'full hearing' – a fair and open hearing . . .

embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them"). Such a denial of process must survive at least the rigorous review recognized by U.S. due process, *see Mathews v. Eldridge*, 424 U.S. 319, 345-46 (1976), and the law of other states, *see, e.g.*, *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre*, A.C. 97, 111 para. 22 (P.C. 1996) (stating that Hong Kong "courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances"). This lack of process constitutes procedural arbitrariness under the ICCPR and must be remedied, if the United States is to comply with its obligations under the ICCPR. *See Alvarez-Machain*, 331 F.3d at 620 (stating that "there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention").

Although the ICCPR provides procedures for derogating from its prohibition on arbitrary detention, the Government has ignored these procedures. To derogate from the ICCPR, the derogating government must officially proclaim the existence of a "public emergency which threatens the life of the nation." ICCPR art. 4(1). Derogation is permitted only when it is "strictly required by the exigencies of the situation," does not involve discrimination, and is consistent with the derogating government's other obligations under international law. *Id.* It is not enough that summary detention without review is within the reasonable range of responses to the situation; the situation must make derogation imperative. *See* U.N. Hum. Rts. Committee, General Comment 29 para. 5, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) ("General Comment No. 29") (stating that derogating parties must show not only that the exigencies "justify" derogation, but that they "require" it). Parties to the ICCPR may not derogate from certain ICCPR articles. *See* ICCPR art. 4(2). However, Article 9, prohibiting arbitrary detention, is not among them. *See id.*

The derogating power must notify the other ICCPR parties through the Secretary General of the United Nations. *See id.* art. 4(3). States historically have followed derogation procedures to respond to emergency conditions without adverse consequence. The ICCPR makes clear that states derogating from it must only do so temporarily. *See* General Comment No. 29 para. 1. The British government recently derogated from the ICCPR to pass the Anti-Terrorism, Crime and Security Act of 2001. *See* Multilateral Treaties Deposited with the Secretary General: Status as of Dec. 31, 2002, U.N. Doc. ST/LEG/SER.E/22 (2002). In addition, Algeria, Argentina, Azerbaijan, Chile, Colombia, Ecuador, Guatemala, Israel, Nambia, Nepal, Nicaragua, Peru, Poland, the Russian Federation, Serbia and Montenegro, Sri Lanka, Sudan, and Trinidad and Tobago all have formally derogated from the ICCPR in states of siege or imposition of martial law occurring in the past twenty years. *See id.*

Having failed to derogate formally from Article 9 of the ICCPR, however, the Government must adhere to it even in the most trying times. *See Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 para. 25 (Jul. 8) ("The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.").

Even if the Government decided to derogate, the United Nations Human Rights Committee, a panel of experts established to monitor ICCPR implementation, stated recently that "[i]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant." General Comment No. 29 para. 16.

Moreover, customary international law requires governments to provide their detainees with a meaningful opportunity to challenge the basis of their detention in times

of war and peace. *See Winterwerp v. The Netherlands*, 2 Eur. H.R. Rep. 387, 403 para. 39 (1979) ("In a democratic society subscribing to the rule of law no detention that is arbitrary can ever be regarded as lawful.") (footnote omitted) (citing European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(3)); *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) (stating that arbitrary detention violates the laws of war); *Caballero v. United Kingdom*, App. No. 32819/96, 30 Eur. H.R. Rep. 643, 652 paras. 42–44 (2000) (finding automatic denial of bail arbitrary, in part, because the judge failed, having heard the accused himself, to examine all the facts relating to the existence of a genuine public interest justifying denial).

A principal source of this requirement under customary international law is foreign case law reviewing challenges to alleged arbitrary detentions.[13] Judiciaries in foreign countries facing ongoing terrorist threats have required their governments to provide detainees a meaningful opportunity to challenge the basis of detention, even when the detainees are suspected either of committing or conspiring to commit terrorist acts or of being members of a terrorist organization. *See, e.g.*, Further Hearing 7048/97, *Anon. v. Minister of Defence*, 54(1) P.D. 721, 743 (2000) (permitting Hezbullah detainees the opportunity to challenge the basis of their

[13] U.S. courts historically have determined the content of customary international law by examining the practices of nations, as evidenced by treaties, U.N. declarations, court decisions, and scholarly writings. *See Filartiga v. Peña-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) ("The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'") (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (examining scholarly writings to determine content of the "law of nations")); *see also Aquamar, S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1295 (11th Cir. 1999) ("We look to a number of sources to ascertain principles of international law, including international conventions, international customs, treatises, and judicial decisions rendered in this and other countries.").

detentions by the Israeli government and invalidating detention past the limit of the detainees' sentences); *Queen on the Application of Abbasi & Anor. v. Secretary of State*, 2003 U.K.H.R. Rep. 76 para. 60 (C.A. 2002), *available at* 2002 WL 31452052 (finding that "[t]he underlying principle, fundamental in English law, . . . that every imprisonment is prima facie unlawful" is applicable to British citizens "in war as in peace," as "'no member of the executive can interfere with the liberty . . . of a British subject except on the condition that he can support the legality of his action before a court of justice.'" (quoting *R v. Home Secretary ex p. Khawaja* (1984) 1 A.C. 74)).[14]

As part of the requirement to provide a meaningful opportunity to challenge the basis of detention, British and Spanish courts have held that detainees, accused of committing crimes involving acts of terrorism, are entitled to the right to counsel. *See Regina v. Mullen*, No. 9704978/Z3, 2 Cr. App. R. 143, at 14 (Crim. App. 1999) (holding that "insulation" of an individual, suspected of conspiring to cause explosions likely to endanger life or cause serious injury to property, "from any legal advice following his detention . . .

[14] The consistent practice of other nations under a sense of legal obligation serves as further evidence of customary international law's prohibition on arbitrary detention. *See, e.g.*, American Convention on Human Rights, *adopted* Nov. 22, 1969, Hein's No. KAV 2307, art. 7(2)–(3), 1144 U.N.T.S. 123 ("No one shall be subject to arbitrary arrest or imprisonment."); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. LV/I.4 Rev. (1965) art. 25; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5(1), 213 U.N.T.S. 222; Organization of African Unity: Banjul Charter on Human and Peoples' Rights, Jun. 27, 1981, 21 I.L.M. 58 (1982); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, arts. 3, 9 (1948); *Siderman de Blake v. Argentina*, 965 F.2d 699, 719 (9th Cir. 1992) ("The Universal Declaration of Human Rights is a resolution of the General Assembly of the United Nations. As such, it is a powerful and authoritative statement of the customary international law of human rights.").

was contrary to [his] entitlement as a matter of human rights" and thus "in breach of Public International Law"); TC, May 16, 2000 (S.T.C., 127) (requiring the authorities to immediately inform detainee, after being arrested for a crime involving terrorism, of his right to counsel).

III. THE GOVERNMENT'S ASSERTION THAT IT CAN DISREGARD MANDATES OF INTERNATIONAL LAW CONFLICTS WITH THIS COURT'S TRADITIONAL RELIANCE ON SUCH LAW WHEN DEFINING THE SCOPE OF THE GOVERNMENT'S WARTIME DETENTION POWERS AND INDIVIDUAL RIGHTS.

This Court has traditionally considered international law when interpreting the scope of Executive detention powers, ambiguity in federal statutes, and individual rights.[15] Therefore, the Government cannot rely on Article II of the Constitution and the Joint Resolution to support the arbitrary detention of Mr. Padilla because it is inconsistent with international law. *See* Resp't's Br. in Opp'n to Pet. for Cert. at 14-17.

A. The Court Has Considered International Law When Determining the Scope of Constitutional Powers.

When reviewing the scope of the Executive's detention powers, this Court has long considered international law. Even in the Government's centerpiece case, *Ex parte Quirin*,

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[15] In determining the scope of the Government's constitutional powers, as well as the scope of individual rights, this Court frequently has looked to international law. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." *Paquete Habana*, 175 U.S. 677, 700 (1900). Customary international law has long been embedded into American common law. *See Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159-61 (1795) ("This is so palpable a violation of our own law ... of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since ... ").

this Court, when reviewing the scope of wartime detention powers granted to the Executive under Article II, referred to international law in determining what procedural protections must be afforded to those captured and held as "enemy belligerents." *Ex parte Quirin*, 317 U.S. at 31, 38. Considering whether the acts charged constituted an offense against the law of war, this Court consulted various sources of domestic *and* international law to determine the scope of the Executive's detention powers. *Id.* at 35-36 ("This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.") (citing and quoting foreign military manuals and other texts).

Similarly, in determining whether a German national convicted by a U.S. military commission could pursue habeas relief, the Court extensively reviewed the then-relevant rules of international law to ensure that they would not be violated by its decision. *See Johnson v. Eisentrager*, 339 U.S. 763, 785-88 (1950); *id.* at 785 (noting "[t]he practice of every modern government"); *id.* at 786 (citing treaty law); *id.* at 787-88 (citing Hague Regulations and secondary sources on international law). Likewise, in *Ex parte Milligan*, the Court cited the practices of foreign governments in support of its holding that the Executive lacked constitutional power to subject civilians to military courts-martial where the civil administration was not deposed and its courts were open. 71 U.S. (4 Wall.) 2, 38-40 (1866) (discussing power of English and French monarchs to impose courts-martial upon subjects). In turning its back on the demands of international law, the Government is violating the clear precepts of American jurisprudence enunciated by the Court.[16]

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[16] During the Vietnam War, the U.S. Military Court of Appeals ruled that, exceeding his orders, a U.S. Marines lance corporal's forced entry

B. Federal Statutes, Where Ambiguous, Must Be Construed Consistently with Applicable International Law.

Similarly, the Government must enforce the Joint Resolution consistently with international law and avoid a construction of the Joint Resolution, or any other Congressional act, that would violate international law "if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Accordingly, courts will not interpret a statute to supercede international law absent a clear showing that Congress intended for the statute to do so. *See* Restatement (Third) § 114.

The Joint Resolution generally empowers the Executive to use "all necessary and appropriate force" against those nations, organizations, or persons responsible for the September 11th terrorist attacks, or those persons that harbored such organizations or persons, in order to prevent future terrorist attacks against the United States. But detaining Mr. Padilla as an "enemy combatant," a term unrecognized and undefined at law, cannot be "necessary and appropriate." Moreover, the Joint Resolution never expressly authorizes the Executive to detain Mr. Padilla (or others) as an "enemy combatant" without any opportunity to challenge the basis of his detention. Therefore, to the extent that Mr. Padilla's detention is inconsistent with international law, the Joint Resolution cannot be interpreted to authorize his detention without a meaningful opportunity to challenge the basis of his detention. *See Padilla*, 352 F.3d at 712 (stating that the President's authority to detain Mr. Padilla as an "enemy combatant" is not "at its maximum" because the Joint Resolution does not authorize his detention) (citing

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into a Vietnamese home with the intent to summarily execute its inhabitants "is unjustifiable under the laws of this nation, the principles of international law, or the laws of land warfare." *United States v. Schultz*, 39 C.M.R. 133, 136 (C.M.A. 1969).

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)) (Jackson, J., concurring).

C. The Court Has Considered International Law When Determining the Scope of Constitutional Rights.

Moreover, when interpreting the scope of certain constitutional rights, this Court also has considered foreign precedent and treaty law.[17] Specifically, the Court has considered foreign precedent when discussing the right to engage in sodomy in the privacy of one's home, *see Lawrence v. Texas*, 539 U.S. 558, __, 123 S. Ct. 2472, 2483 (2003), the history of assisted-suicide law, *see Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997), the application of the Eighth Amendment to the death penalty, *see, e.g., Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (Stevens, J.); *Enmund v. Florida*, 458 U.S. 782, 796-97 & n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958); *see also Stanford v. Kentucky*, 492 U.S. 361, 389-90 (1989) (Brennan, J., dissenting); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari), and the conflict between campaign finance laws and the First Amendment, *see Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring). Last term, Justices Breyer and

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[17] The U.S. Supreme Court has "long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances." *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J. dissenting from denial of certiorari). Federal appellate courts have shown a similar tendency to draw support from international sources. *See, e.g., Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996) (citing opinions of courts from Canada and the United Kingdom, both of which were signatories to the Hague Convention, to support its restrictive reading of the Hague Convention's implementing legislation); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995) (same) ("We should give considerable weight to these well-reasoned opinions of other Convention signatories.").

Ginsburg also discussed the International Convention on the Elimination of All Forms of Racial Discrimination, a treaty ratified by the U.S., as support for the Court's observation that affirmative action programs "must have a logical end point." *Grutter*, 539 U.S. at 306 (Ginsburg, J., concurring) (framing the extent to which admissions programs at the University of Michigan may consider race, in part, by observing the "international understanding of the office of affirmative action").

IV. THE GOVERNMENT'S DETENTION OF MR. PADILLA IS INCONSISTENT WITH ITS STRONG CONDEMNATION OF ARBITRARY DETENTION AND PROMOTION OF THE RULE OF LAW WORLDWIDE.

The rule of law is only as strong as a government's adherence to it. Its fortitude depends not only upon the independence of a judiciary, but also upon the Executive branch's commitment to law enforcement and to the principles that such enforcement is aimed to preserve. Thus, in the context of international and domestic human rights and humanitarian law, the Government must enforce not only the law but also the principles of human dignity. *See* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 Harv. Int'l L.J. 503, 531 (2003) ("Destruction of American values, overreaction, the weakening of real bases of strength of our democratic institutions, and lawless law enforcement can fulfill terrorist ambitions and are ultimately more threatening than actual terrorist attacks. Judges in a democracy committed to law and human dignity cannot countenance such a result.").

By detaining Mr. Padilla outside the law for over two years without either the opportunity to present testimony to refute the basis of his detention or meaningful access to counsel, the Government is engaging in the very practice of arbitrary detention that it has condemned worldwide for decades. In statements to Congress and to the United Nations, United States government officials recently and repeatedly

have singled out the practice of arbitrary detention by other countries, such as Afghanistan,[18] Cuba,[19] the Democratic Republic of Congo,[20] Iran,[21] Iraq,[22] Russia,[23] and Sudan[24] for

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[18] Testifying before Congress, Secretary of Defense Donald H. Rumsfeld quoted an Amnesty International report stating that the "Afghans suffered pervasive 'human rights abuses, including arbitrary detention ....'" Hearing to Review Testimony on Operation Enduring Freedom Before the Senate Comm. on Armed Services, 107th Cong. (July 31, 2002) (statement of Hon. Donald Rumsfeld, Sec. of Defense), *available at* http://www.senate.gov/ ~armed_services/statemnt/2002/July/ Rumsfeld2.pdf.

[19] *See, e.g.*, Hearing Regarding U.S.-Cuba Economic Relations Before Senate Comm. of Finance, 107th Cong. (Sept. 4, 2003) (statement of Alan Larson, Under Secretary of State for Economic, Business, and Agricultural Affairs, before the Senate Finance Committee), *available at* http://finance.senate. gov/hearings/testimony/2003test/090403altest.pdf.

[20] Statement of Harold Hongju Koh, U.S. Assistant Secretary of State, Democracy, Human Rights & Labor, Before the U.N. Commission on Human Rights (Mar. 30, 2000) (stating that "in the Democratic Republic of Congo . . . government and anti-government forces - as well as troops of the governments supporting each side - have committed . . . arbitrary detentions"), *available at* http://usinfo.state.gov/regional/ea/uschina/ koh330.htm.

[21] Statement of Ambassador Madeleine K. Albright, United States Permanent Representative to the United Nations, on Human Rights Situations and Reports before U.N. General Assembly, Third Comm. (Social, Humanitarian and Cultural) (Nov. 28, 1995), *available at* http://dosfan.lib.uic.edu/ERC/intlorg/ press_releases/951128.html.

[22] While U.S. soldiers were marching to Baghdad, Secretary of State Colin Powell, referring to the State Department's 2002 Iraq Country Report, decried the fact that Iraqi "authorities routinely used arbitrary arrest and detention, prolonged detention, and incommunicado detention, and continued to deny citizens the basic right to due process." U.S. Department of State's Annual Human Rights Report (Mar. 31, 2003), in U.S. Department of State Press Release, State Department Report Outlines Human Rights Abuses in Iraq-Powell Cites Saddam's Regime as Great Threat to Global Peace, Stability, *available at* 2003 WL 2047088.

[23] Statement of Lorne W. Craner, Assistant Secretary of State for Democracy, Human Rights, and Labor, Before a Helsinki Commission

their practice of arbitrary detention. Also, the House and Senate have passed resolutions urging the People's Republic of China to release Wang Bingzhang and Dr. Yang Jianli, who have been arbitrarily detained. *See* S. Res. 184, 108th Cong. (2003) (resolving that Dr. Jianli's detention violates Article 9 of the ICCPR and Article 9 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948)); H. Con. Res. 326, 108th Cong. (2003); Press Release, Senator Jon Kyl, Senate Passes Kyl-Mikulski Resolution to Free U.S. Resident Held in China Since 2002 Dr. Yang Jianli Detained in China for Pro-Democracy Views (July 30, 2003), *available at* 2003 WL 11710378. The force of this position is severely diluted when the United States denies fundamental aspects of due process to its own wartime detainees. For example, Russia's arbitrary detentions continue in the face of what Russia has deemed to be terrorist threats from Chechen forces, despite statements from U.S. officials condemning such detentions. *See* Craner Statement, *supra* note 23 (stating that Russia's arbitrary detentions "are not consistent with international humanitarian law or Russia's OSCE and international human rights commitments").

As an unjustified violation of international law, the Government's arbitrary detention of Mr. Padilla also has compromised the United States' concerted effort to promote democracy and the rule of law abroad. Despite the Government's blatant disregard for international law here, the Executive has repeated the case to the American people that the objective of establishing a rule of law in Afghanistan and

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hearing on Sept. 9, 2003, in U.S. Department of State Press Release, Lorne Craner Testimony at Sept. 9 Helsinki Commission Hearing, *available at* 2003 WL 2050164 (Sept. 10, 2003).

[24] Statement of Lorne W. Craner, Assistant Secretary of State for Democracy, Human Rights, and Labor, Hearing on a Review of the State Department Country Reports on Human Rights Practices, Before the House Subcomm. on Terrorism, Nonproliferation and Human Rights, of the House Comm. on Int'l Relations, *available at* 2003 WL 1998849 (Apr. 30, 2003).

Iraq underlies the U.S. military – and now nation-building – exercises there. At his first State of the Union Address, President Bush emphasized that "no nation is exempt from" the defense of liberty and justice. State of the Union Address, *at* http://www. whitehouse.gov/news/releases/2002/01/print/ 20020129-11.html (Jan. 29, 2002).[25] The President enunciated similar objectives for the invasion of Iraq last year: "As we press on to liberate every corner of Iraq, . . . [w]e'll help the Iraqi people to establish a just and representative government, which respects human rights and adheres to the rule of law." President George W. Bush, Remarks on Iraq from the Rose Garden (Apr. 15, 2003), *available at* http://www. whitehouse.gov/ news/releases/ 2003/04/ print/20030415-10.html.[26] Enforcing and practicing those policy objectives have secured the fair treatment of our own men and women captured on the field of battle and have paved the way for a more stable and humane world.

CONCLUSION

Amicus, Global Rights, respectfully urges the Court to affirm the decision below not only to hold the United States to its commitments under international law, but also to preserve

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[25] Punctuated by applause from both sides of the House chamber, the President further stated: "America will always stand firm for the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance." State of the Union Address, *at* http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html(Jan. 29, 2002) ("[W]e have a greater objective than eliminating threats and containing resentment. We seek a just and peaceful world beyond the war on terror.").

[26] "Our support for human rights policy in a positive way to create better human rights conditions around the world, our honest and forthright human rights reports: all of these things have continued. And they've continued alongside as part of our policy on terrorism." State Department Spokesman Richard Boucher, *in* U.S. Department of State Press Release, Transcript: State Department Noon Briefing, May 29, 2003, *available at* 2003 WL 2048222 (May 29, 2003).

the long-standing regime of human rights law that has protected scores of individuals from arbitrary caprice and Executive whim.

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
Petitioner,

v.

JOSE PADILLA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE CENTER FOR NATIONAL SECURITY STUDIES AND THE CONSTITUTION PROJECT AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the President has authority, either under the Authorization For Use Of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), or the Commander-in-Chief Clause of Article II of the Constitution, to order the indefinite detention of a U.S. citizen who neither was apprehended in a zone of active combat operations nor is an acknowledged member of the armed forces of a hostile state.

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IN THE

Supreme Court of the United States

No. 03-1027

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
Petitioner,

v.

JOSE PADILLA,
Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**BRIEF FOR
THE CENTER FOR NATIONAL SECURITY STUDIES
AND THE CONSTITUTION PROJECT
AS AMICI CURIAE SUPPORTING RESPONDENT**

INTEREST OF AMICI CURIAE[1]

The Center for National Security Studies is a nonprofit, nongovernmental civil liberties organization in Washington, D.C., that was founded in 1974 to ensure that civil liberties are not eroded in the name of national security. The Center has worked for more than 25 years to find solutions to national security problems that protect both the civil liberties of individuals and the legitimate national security interests of the government.

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this brief have been submitted to the Clerk.

The Constitution Project is a nonprofit, bipartisan organization based at Georgetown University's Public Policy Institute that seeks to build consensus on and develop solutions to contemporary legal and constitutional issues through a combination of scholarship and public education. After September 11, 2001, the Project created its Liberty and Security Initiative, consisting of a bipartisan, blue-ribbon committee of prominent Americans, to develop recommendations on such issues as the use of military tribunals and the detention of suspected terrorists.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises issues fundamental to this Nation's conception of itself as a republic governed by the rule of law. From our heritage in the English parliamentary and common law systems, as supplemented by our experience in overthrowing monarchical rule, this Nation has derived four irreducible principles of liberty. *First*, no person may be subject to governmental restraint without clear warrant in positive law. *Second*, the legislative, executive, and judicial powers—the powers to make, to enforce, and to construe the law—belong in three separate branches of government, and certainly may not be combined in one person or entity. *Third*, the government must justify any significant and extended deprivation of liberty through some kind of meaningful process in which an individual may present his or her case against detention. *Fourth*, military power, although obviously necessary to the protection of the Nation, must be narrowly confined so as not to supplant civil institutions, including the civil courts.

The position taken by the government in this case imperils all four of these core principles. A cornerstone requirement of due process is that no person may be deprived of liberty without justification in law. To justify the detention of respondent, the Executive must be able to point to some source of law—statutory or constitutional—empowering the President to deprive respondent of his liberty. This the Executive has not done, for no statute authorizes respondent's indefinite detention, and the President's inde-

pendent military authority under the Constitution does not extend to exercising unreviewable control over a U.S. citizen in the United States who neither was apprehended in a zone of active combat operations nor is an acknowledged member of the armed forces of a hostile state.

Amici do not discount the seriousness of the threat presented by al-Qaeda. In response to the attacks of September 11, 2001, Congress and the President have determined that the exercise of military force abroad against al-Qaeda and its Taliban protectors in Afghanistan was needed to protect the security of the United States. That is the prerogative of those institutions, and the military is today engaged in operations overseas, pursuant to congressional authorization and presidential direction. Should someone bearing arms on behalf of al-Qaeda be apprehended by the military in a zone of active combat operations in Afghanistan, the military would plainly have authority to detain that person to protect the security of U.S. forces, just as it would have authority to detain a member of the armed forces of a hostile state during a declared war. But within the United States, as long as our civil institutions are functioning (as they are now), civil law prevails. Only in very narrow circumstances may the President exercise *military* control over individuals within the United States, and those circumstances are not present here.

For some, the profound sense of anxiety and vulnerability that has resulted from the terrorist attacks against the United States argues for a new paradigm for our government. In this new paradigm, the President is presumed to need unfettered power to address terrorism, and our traditional aversion to expanding power by the military is to be subordinated to the President's authority. But we do not need a new paradigm; the time-tested rule of law is far more than sufficient. Under the rule of law, Congress has the principal responsibility for authorizing deprivations of liberty, such deprivations must be accompanied by fair procedures including neutral tribunals, and civil authority is supreme in carrying out the coercive power of the government. *That* paradigm, which predated and undergirded the crea-

tion of this country two centuries ago, has served us well over time and has been a beacon to the rest of the world. *Cf. United States* v. *Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile."). It should not be abandoned now.

ARGUMENT

I. RESPONDENT'S DETENTION IS NOT AUTHORIZED BY STATUTE

"The President's power, if any, to issue the order [detaining respondent] must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952). When a power so extraordinary as that claimed in this case is at issue, it is all the more important to be certain whether the power is well grounded in a source of law. The first step, accordingly, is to determine whether any Act of Congress vests the President with the authority to detain an individual, such as respondent, who was not apprehended in a zone of active combat operations and is not a member of the armed forces of any hostile state. As we show, not only is respondent's detention not authorized by statute, it is in fact prohibited by law.

A. The Authorization For Use Of Military Force Against Al-Qaeda Does Not Authorize Respondent's Detention

The government argues principally that Congress's Authorization For Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), provides the President with the authority to detain respondent. Pet. Br. 38-44. The AUMF, however, does not expressly authorize detention of any kind. Thus the government's argument must be that a power of indefinite detention is implied in the grant of authority to use military force.

In some circumstances, of course, congressional authorization to the President to use military force includes authorization to the military to detain some individuals. Congress's statutory authorization to use military force activates the President's Commander-in-Chief powers and thus empowers the President to prosecute military operations to successful conclusion and to protect the security of U.S. armed forces in doing so. In deploying military force, the President is entitled to detain individuals where to do so is consistent with the well-settled law of war—centrally, enemy soldiers (i.e., actual members of the armed forces of a hostile state), persons apprehended on the battlefield, and (in some cases) civilians who are citizens of enemy states and who have lent active assistance to hostile forces by (for example) ferrying munitions or battlefield intelligence to the enemy. *See Johnson* v. *Eisentrager*, 339 U.S. 763, 786 (1950); *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942). Where the President's Commander-in-Chief powers are most directly implicated, during the conduct of actual combat operations, the authority to detain such persons flows naturally from congressional authorization to use military force.[2] Thus, when the President, acting pursuant to the AUMF, deployed military force in Afghanistan, he was authorized by Congress to detain combatants captured in actual hostilities. *See Hamdi* v. *Rumsfeld*, 316 F.3d 450, 467 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004).[3]

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[2] Even in situations where the President has not been expressly authorized by Congress to use military force overseas—as was the case with the United States' military operations in the former Yugoslavia, *see Campbell* v. *Clinton*, 203 F.3d 19 (D.C. Cir. 2000)—once the President determined to use such military force overseas, his Commander-in-Chief powers would presumably be broad enough to detain persons apprehended in combat situations as well. In such situations, it might be open to question whether the President had authority under the Constitution to engage in combat operations without congressional authorization, but that is a separate question from whether, having done so, he had authority to ensure the safety of U.S. combat forces under his command by, among other things, detaining hostile combatants apprehended in battle.

[3] The fact that the President has authority to detain combatants apprehended in a combat zone does not mean, however, that he has unfettered authority to detain them indefinitely beyond the end of military hostilities, and without process of any kind. For example, a detainee, including a U.S. citizen, who claimed prisoner of war status would be entitled to a proceeding before a tribunal contemplated by Article 5 under the

Those situations, however, are far removed from the present case, which involves an individual who was apprehended in the United States, far from any zone of actual combat operations, and who is not a member of the armed forces of a hostile state. Congress has not extended the President's military powers so far into the domestic sphere. In this regard, it bears emphasis that the AUMF is not an open-ended grant of power to the President to do anything he thinks suitable. Rather, it authorizes the President to use "all necessary *and appropriate* force" against those organizations that aided the terrorist attacks of September 11, 2001. Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added). In carefully choosing the terms "necessary *and appropriate* force," Congress intended that the President not act in violation of either the Constitution or the well-settled law of war, for to do so would not be "appropriate."[4] And the AUMF should be construed to conform to, not conflict with, background principles of constitutional law, *see NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501 (1979), and international law, *see Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

The premise of the government's argument—that under the AUMF, the military could have shot respondent dead, and so the military must also be authorized to detain him—is flawed. Despite the government's use of the label "combatant" to refer to respondent, he does not meet the criteria under the well-settled law of war for a person against whom deadly military force may be deployed. Unlike the individu-

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Third Geneva Convention, in which he could establish his right to treatment as a prisoner of war. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135. If a detainee were denied such process—as is the case with petitioner Hamdi in *Hamdi* v. *Rumsfeld*, No. 03-6696—he would be entitled to a writ of habeas corpus under 28 U.S.C. § 2241 directing the government to provide him with appropriate procedural rights.

[4] *Cf. Printz* v. *United States*, 521 U.S. 898, 923-924 (1997) (noting that Constitution's grant of power to Congress to enact "necessary and proper" laws does not authorize Congress to enact laws that violate constitutional principles of state sovereignty, as such laws are not "proper").

als tried before military tribunals in *Ex parte Quirin*, 317 U.S. 1 (1942), *In re Territo*, 156 F.2d 142 (9th Cir. 1946), and *Colepaugh* v. *Looney*, 235 F.2d 429 (10th Cir. 1956), respondent is not a member of the armed forces of a hostile state. Nor does respondent fall within any other well-settled category of other persons over whom military control may be exercised under the law of war. For example, respondent was not engaged in battlefield operations when he was apprehended; if he had been so engaged, he would have been subject to military control even if he were not a member of the armed forces of a hostile state (such as, for example, al-Qaeda combatants captured in battle in Afghanistan, or members of the Viet Cong captured during the Vietnam War). Nor is respondent one of the clearly identified leaders of al-Qaeda who planned the September 11 terrorist attacks and who would therefore be the legitimate target of military force (indeed, the government has never even made such a suggestion).

The government has stressed that, in *Quirin*, this Court distinguished *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), where it disapproved use of a military commission to try a non-belligerent sympathizer with the Confederacy, on the ground that Milligan (unlike the Nazi saboteurs in *Quirin*) was not "a part of or associated with the armed forces of the enemy." *Quirin*, 317 U.S. at 45. The government seizes on this language to argue that respondent is "associated with" al-Qaeda and therefore may be subject to exclusively military control. But in using the phrase "associated with the armed forces," the Court in *Quirin* did not grant broad authorization to the President to use military power to indefinitely detain someone in the United States based on a suspicion that that person may be planning acts threatening public safety. To the contrary, U.S. citizens who have been suspected of acting as spies and saboteurs in concert with enemy powers (other than those who, like Haupt in *Quirin*, actually joined an enemy army) have traditionally been prosecuted in civil courts—as was the case with the civilians

who conspired with the Nazi saboteurs in *Quirin*.[5] *See Haupt* v. *United States*, 330 U.S. 631 (1947); *Cramer* v. *United States*, 325 U.S. 1 (1945); *see also infra* pp. 11-12 (discussing Emergency Detention Act of 1950, providing for civilian detention of suspected saboteurs). The Court in *Quirin* was merely accurately reciting the fact that, under the well-settled law of war, certain persons who are not actually enrolled in the armed forces of a hostile state may be seized by the military if they have inserted themselves into combat situations.[6]

The use of military force against an individual such as respondent would also raise grave constitutional concerns. The Fourth Amendment bars the use of deadly force against an individual who does not pose an imminent threat to the safety of others. *See Tennessee* v. *Garner*, 471 U.S. 1 (1985). The government has never argued that respondent ever posed such an imminent threat. Thus, it is simply not the case that the military could have shot respondent dead—as it could shoot dead a member of a hostile army. Moreover, even if respondent were not shot dead, subjecting him to military control would constitute a significant intrusion on the Fifth and Sixth Amendment rights to which he would be entitled if he were prosecuted in civil court. *See Reid* v. *Covert*, 354 U.S. 1, 21 (1957) (opinion of Black, J.).

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[5] This Court was undoubtedly aware, when it issued its opinion in *Quirin* referring to persons "associated with" enemy armies, that the civilians who had conspired with the Nazi saboteurs were being prosecuted in civil courts. Chief Justice Stone announced the opinion for the Court in *Quirin* on October 29, 1942. Cramer's much-publicized treason trial commenced a few days later, on November 9, 1942. *See* J. Woodford Howard, Jr., *The* Cramer *Treason Case*, 1 J. Sup. Ct. Hist. 49, 50 (1996); David J. Danielski, *The Saboteurs' Case*, 1 J. Sup. Ct. Hist. 61, 79 (1996).

[6] *Cf., e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135 (providing that "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces" may qualify as prisoners of war).

This Court has been skeptical of the argument that congressional authorization to use military force should be implied to include a broad power to subject persons within the United States to military control and to remove them from the purview and protection of civil institutions. In *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1945), for example, the Court rejected the government's argument that a statute granting the Governor of Hawaii the power to place Hawaii under "martial law" necessarily included the power to subject civilians to trial before military tribunals. While accepting that the power to impose "martial law" granted in the act "authorize[d] the military to act vigorously for the maintenance of an orderly *civil government* and for the defense of the island against actual or threatened rebellion or invasion," the Court declined to read the statute as authorizing "the supplanting of courts." *Id.* at 324 (emphasis added); *accord Milligan*, 71 U.S. (4 Wall.) at 127 ("As necessity creates the rule, so it limits its duration, for if [military] government is continued *after* the courts are reinstated, it is a gross usurpation of power."). As the Court stated in *Ex parte Endo*, 323 U.S. 283, 300 (1944):

> In interpreting a war-time measure we must assume that [Congress's] purpose was to allow for the greatest possible accommodation between [civil] liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated they used.

Accordingly, the Court should not construe the AUMF to authorize the military detention of respondent.

B. Respondent's Detention Is Prohibited By 18 U.S.C. § 4001(a)

Not only is respondent's detention not authorized by statute, it is in fact prohibited by 18 U.S.C. § 4001(a), commonly referred to as the Non-Detention Act. Section 4001(a) of Title 18 provides: "No citizen of the United States shall

be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Accordingly, § 4001(a) precludes respondent's detention by the military unless (as the government argues), it contains an implicit exception authorizing such military detention or is itself unconstitutional.

The government argues that, notwithstanding its sweeping language, Section 4001(a) should be read to preclude detention without statutory authorization *only* by federal civilian authorities, and not by the military. Pet. Br. 44-49. But as this Court has stated, § 4001(a) proscribes "detention of *any kind* by the United States, absent a congressional grant of authority to detain." *Howe* v. *Smith*, 452 U.S. 473, 479 n.3 (1981). Respondent is surely "detained" by military force. Had Congress intended § 4001(a) to govern only civil incarceration, it might have limited the statute's reach to citizens "imprisoned," but it went further to preclude unauthorized detention of *any* kind. Moreover, respondent's detention is surely "by the United States." The military is no less a part of "the United States" than the civil authorities.[7]

More fundamentally, the government's argument would render § 4001(a) essentially nugatory. An example that illuminates the core purpose of § 4001(a) may be helpful. All agree that § 4001(a) was intended centrally to prevent any repetition, without express congressional approval, of this

[7] Although the government presents its "military detention" exception to § 4001(a) as a saving construction of that law, to avoid a purported constitutional clash with the President's Commander-in-Chief powers under Article II of the Constitution, it is not evident what statutory language the government believes may be construed to provide such an exception. The doctrine favoring construction of statutes to avoid constitutional doubt has application only where there is statutory language susceptible of more than one construction. *See Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998); *Salinas* v. *United States*, 522 U.S. 52, 59-60 (1997). The government points to no such language here. Moreover, the government's construction of § 4001(a) to permit military detention of citizens at the unilateral behest of the President would obviously *create* constitutional concerns, as discussed below. Thus, the statute should simply be construed according to its plain terms.

country's experience with internment camps such as those in which persons of Japanese ancestry were confined during World War II. *See Endo*, 323 U.S. at 291-294; H.R. Rep. No. 92-116, at 5 (1971); *see also* S. Rep. No. 92-304, at 3 (1971) (letter of Sen. Inouye). But if the government's sweeping "military exception" to § 4001(a) were adopted, then the President could, without authorization from Congress, replicate this country's experience with internment camps simply by directing that the camps be run by the military.

The government notes that the World War II camps were administered by a civilian authority, the War Relocation Authority (WRA). Pet. Br. 46. Presumably, this point is meant to suggest that, if the President wished to establish similar camps today under military control, he could do so without running afoul of § 4001(a). But the prohibition of § 4001(a) surely cannot turn on the happenstance of which federal entity sits atop the administrative scheme, and the fact that the World War II camps were administered by the WRA does not demonstrate that the Congress that enacted § 4001(a) would have wanted the President to be able to establish internment camps without congressional authorization merely by placing them under military administration.

Moreover, the government significantly overstates the civilian character of the World War II camps. Although the authority that actually operated the camps, the WRA, was technically not within the armed forces command, the relocation camps were part and parcel of the *military* decision to remove persons of Japanese ancestry from the West Coast.[8] Indeed, the government's brief in *Endo* emphasized that the camps were an integral part of the military's evacuation program.[9] As the government stressed in *Endo*, the camps

[8] The WRA was initially located within the Executive Office of the President, but was subsequently transferred to the Department of the Interior. *See Endo*, 323 U.S. at 287, 290 n.4; Exec. Order 9102, 7 Fed. Reg. 2165 (1942).

[9] *See* U.S. *Endo* Br. 40-41 ("Under the Order relocation is considered to be an integral part of the evacuation from the West Coast. The detention which is an incident to relocation is, therefore, a continued consequence of the evacuation . . . ."), 63 ("The broad terms of the Order make it

were themselves established by military order—specifically, General DeWitt's Public Proclamation No. 8 of June 27, 1942—and it was also that military proclamation that laid down the evacuees' obligation to remain within the camps to which they were transferred. U.S. *Endo* Br. 14, 69, 109-111; *Endo*, 323 U.S. at 285-287. Thus, while the civilian WRA administered the camps, it was a military order that created them and prevented the evacuees from leaving without permission. In addition, it was disobedience of military orders, not regulations of the civilian WRA, that was proscribed by the statute on which the government relied in *Endo* to justify the camps. *See* U.S. *Endo* Br. 62, 69-70; Act of Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173.

Congress well understood that the establishment of the World War II camps was closely bound up with the conduct of military operations against Japan. Congress nonetheless explicitly repudiated any repetition of that experience in the absence of express congressional authorization. That repudiation strongly indicates that Congress was unlikely to have acquiesced in the government's theory here that the President's military authority may be projected far into the domestic sphere.

Indeed, at the same time as it enacted § 4001(a), Congress repealed the Emergency Detention Act of 1950 (EDA), which had provided the statutory authorization for *civilian* detention of persons suspected of espionage and sabotage. *See* Pub. L. No. 92-128, § 2(a), 85 Stat. 347, 348 (1971) (repealing 50 U.S.C. §§ 811-826 (1970)). The EDA gave the President, acting through the Attorney General, the power to detain any person based on a reasonable suspicion that the person would engage in espionage or sabotage. 50 U.S.C. § 813(a) (1970). That power, moreover, was to be exercised only during times of grave "internal security emergency," such as a declared war, invasion, or insurrection. 50 U.S.C. § 812(a) (1970). By repealing the EDA, Congress deemed it too dangerous to civil liberties to allow *civilian* authorities to detain persons on the President's direction on suspicion of planning sabotage, even in time of declared war. It is difficult to believe that the same Congress, in the same statute, intended to allow the President to accomplish the same result merely by acting through the military.[10]

clear that relocation was considered to be a phase of the program of evacuation . . . ."), 70-71 ("Accordingly, the detention of evacuees was ordered under the power . . . to exclude persons of Japanese ancestry from the West Coast . . . .").

II. THE PRESIDENT'S INHERENT CONSTITUTIONAL POWERS DO NOT EXTEND TO INDEFINITE DETENTION OF RESPONDENT

A. The President's Claim To Unilateral Authority Lacks Precedent Or Historical Support

Because respondent's military detention is not authorized by statute, his detention could be consistent with due process only if it were rooted in some other source of law to detain individuals—presumably, the Constitution itself. The President contends that the Commander-in-Chief Clause of Article II of the Constitution vests him with the authority to designate an individual in the United States as an "enemy combatant" and thereby remove him from the reach of the civilian courts, based on his determination that that person intends to engage in conduct harmful to national security, such as sabotage. That claim is a dramatic one, for as this Court has noted in another context—where it rejected the contention that the President's Article II foreign affairs powers, however broad, included the power to deprive an individual of liberty without congressional authorization—"the Constitution creates no executive prerogative to dis-

[10] The EDA in fact provided procedural protections to detainees far greater than those that the government is willing to observe in this case. Any decision to detain had to be justified at a hearing before a preliminary hearing officer, and at any such hearing, a detained person had the right to retain counsel, to remain silent, to introduce evidence on his own behalf, and to cross-examine witnesses against him. 50 U.S.C. § 814(d)-(f) (1970). Any person ordered detained also had the right both to administrative review of the detention decision and to judicial review in the federal courts of appeals. The EDA also expressly preserved the right to habeas corpus. 50 U.S.C. § 815(a), § 826 (1970). In the government's view, of course, respondent has none of these rights.

pose of the liberty of the individual. Proceedings against him must be authorized by law." *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936).

In some respects, the President's claim is similar to a contention that the Executive may impose martial law on selected individuals of its choosing. *See* Frederick Bernays Wiener, *A Practical Manual of Martial Law* 10 (1940) (defining "martial law" as "the carrying on of government in domestic territory by military agencies, *in whole or in part*, with the consequent supersession of *some or all* civil agencies").[11] The government seeks to reassure the Court that the designation of an individual as an enemy combatant is subject to a "careful, thorough, and multi-layered process of review." Pet. Br. 27. But the nub of the matter is that, according to the government, the power to determine whether any particular individual meets the criteria for an "enemy combatant" belongs *alone* to Executive Branch, as part of the President's Commander-in-Chief powers. *Id.*[12] Indeed, according to the government, once the President makes the decision that someone is an "enemy combatant," the basis for that determination may not be questioned anywhere else—and certainly not in the Article III courts.[13] Nor, according

[11] To be sure, the government has not in this case claimed that the President has the military authority to detain all individuals within a broad geographic area. On the other hand, the government's argument that the President may act *selectively* to subject some individuals to military control demands even closer scrutiny than an argument that he may act broadly. As a practical matter, a broad geographic imposition of martial law would demand the utmost justification to gain acceptance from the public. By contrast, the President's assertion of power over a few individuals here and there is unlikely to meet with such careful probing, especially if (as the government argues) it may not be reviewed by the courts.

[12] The government certainly does not suggest, for example, that the review process for determining whether any individual is to be designated as an enemy combatant vests anyone with any rights enforceable anywhere if that process is not followed. Nor does it suggest that the President may not terminate that review process, either as a general matter or for any particular case, whenever he prefers for any reason to do so.

[13] In the district court and before the court of appeals, the government argued that, at most, it need only present "some evidence" to support its detention of Padilla. *See* 243 F. Supp. 2d 42, 54-56 (S.D.N.Y. 2003);

to the government, is it necessary for the government to prove its suspicions before any kind of tribunal, civilian or military. In this case, for example, respondent has been detained for nearly two years in solitary confinement in a naval brig. He can assert no rights; the Executive has offered him no legal protection or access to any tribunal.

This Court has stated that, when military authorities, acting within their proper jurisdiction, determine that an individual has violated the laws of war, "their action is not subject to judicial review merely because they have made a wrong decision based on disputed facts." *In re Yamashita*, 327 U.S. 1, 8 (1946). But that point makes it doubly necessary to make sure that the President has acted within his proper jurisdiction in subjecting an individual to military control, and in this case he has not. The government cites *Johnson* v. *Eisentrager* and *Ex parte Quirin* for the proposition that the President's military authority to seize and detain enemy combatants in wartime is well settled. Pet. Br. 27-28. But the question here is not the broad issue of the President's authority to "detain enemy combatants"; rather, the issue is whether the President may, without legislative authorization, indefinitely detain an individual apprehended on U.S. soil who was not a member of the armed forces of any hostile state because the President suspects that individual of being an "enemy combatant." That claim to power lacks any historical roots.

Resp. C.A. Br. 49. The government advocated a proceeding in which it may make factual assertions, many under seal, that both the court and the detainee must take at face value. *See* 243 F. Supp. 2d at 54-56. According to the government, there are no applicable standards prescribing the content of those allegations and no mechanisms by which the courts can test their reliability. Nor, according to the government, does Padilla have any right to make a presentation of the facts that might contradict the government's assertions. Resp. C.A. Br. 49. In reality, therefore, the "proceeding" advocated by the government is no proceeding at all. If a court may hear only one side of a case—the government's—and may not even probe whether that side is well-founded, and if a detained person (such as respondent) may not present his own case, the detainee might as well have no access to a court at all.

Johnson involved German nationals "in the service of German armed forces" who were apprehended overseas for transmitting military intelligence to "the Japanese armed forces" still engaged in hostilities against the United States, in violation of the terms of Germany's surrender. 339 U.S. at 765-766. Those German nationals therefore fell within the "'well-established' . . . 'power of the military to exercise jurisdiction over members of the armed forces [and] those directly connected with such forces,'" *id.* at 786 (quoting *Duncan*, 327 U.S. at 313-314)—in essence, the same category as those persons described by the Court in passing in *Quirin* as being "associated with" the armed forces of a hostile state (317 U.S. at 45).

In *Quirin*, all the persons tried by military commission were undisputed members of the armed forces of a hostile state. *See* 317 U.S. at 38 (noting that the fact that the saboteurs had buried their uniforms was "essential" to the trial for a violation of the law of war). Moreover, in that case, the Court held that Congress had authorized the trial of such persons by military commission for violations of the law of war, and specifically stated that it was unnecessary to determine whether the President, acting unilaterally, would have had authority to subject such persons to trial by military commission. *Id.* at 29.

With the exception of the government's attempt during the Civil War to remove Northern civilian sympathizers with the Confederacy from the control of civil authorities—an attempt that was, of course, repudiated by this Court in *Milligan*—the government points to no occasion in this country's history during which the President has even attempted to exercise the power to exclude from the civil courts persons who were not either members of the armed forces of a hostile state, like the saboteurs in *Quirin*, or persons apprehended in a combat situation, either actually on the battlefield or (like the detainees in *Johnson*) caught transmitting military intelligence to the armed forces of a hostile state. Whether the President ever could do so consistent with our constitutional traditions is a difficult question, but (as discussed below), at a minimum two things are

clear: he may not do without legislative authorization, and he may not do so absent a pressing emergency such that normal civil institutions are precluded from operating; and even then, his authority to do so would be limited to ensuring that individuals were referred to civil authorities as quickly as possible. *See infra* pp. 17-26.

B. Absent Congressional Authorization, Military Detention, Without The Right To Review Or Process, Of An Individual Apprehended In The United States Who Is Not Subject To Well-Settled Categories of Military Jurisdiction Is Impermissible

As discussed at pp. 9-13, *supra*, Padilla's military detention is prohibited by 18 U.S.C. § 4001(a). This, therefore, is a situation where the President's power "is at its lowest ebb," and the Court could sustain the President's claim to unilateral authority "only by disabling Congress from acting upon the subject." *Youngstown*, 343 U.S. at 637-638 (Jackson, J., concurring). In other words, the Court would have to declare § 4001(a) unconstitutional as applied in this case. It is most unlikely, however, that Congress has acted unconstitutionally in protecting civil liberties in this manner. Although the President has substantial independent authority under the Commander-in-Chief Clause, his authority over the military is not exclusive; Congress has authority "to make all rules necessary and proper to govern and regulate" the armed forces. *See* U.S. Const. art. I, § 8, cl. 14; *see also id.* cl. 12 (vesting in Congress, not the President, the power to raise and maintain military forces).

That power surely authorizes Congress to set boundaries to military control over persons not in the armed forces of this country or a hostile state. The Framers, who well understood the dangers and fears of a standing army but who accommodated the need for national self-defense, *see* The Federalist No. 41 (Madison), could hardly have intended that Congress be required merely to acquiesce in the President's assertions of military control over individuals, no matter how expansive. *See* Decl. Indep. ¶ 14 (assailing George III for "affect[ing] to render the Military independent of and

superior to the Civil Power"); The Federalist No. 69 (Hamilton) (observing that the President's military authority "would be nominally the same with that of the king of Great Britain, but in substance much inferior to it" because it "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature." (footnote omitted)).

But even if the prohibition of § 4001(a) simply did not apply in this case, the point remains that respondent's military detention is not authorized by statute. *See supra* pp. 4-9. Due process requires a source of law for the detention of any individual. Thus, to sustain respondent's military detention, the Court would have to conclude that the President had independent power under Article II of the Constitution to order that detention. That is not an authority that the President has on his own.

The authority claimed by the President to place an individual designated as an "enemy combatant" in indefinite military detention, without the right to process or judicial review in any particular case, resembles a claim to authority to selectively suspend the writ of habeas corpus. Such a claim of authority must not be taken lightly; the Great Writ—the "highest safeguard of liberty," *Smith* v. *Bennett*, 365 U.S. 708, 712 (1961)—has as its historic and "most basic purpose . . . avoiding serious abuses of power by a government, say a king's imprisonment of an individual without referring the matter to a court." *Lonchar* v. *Thomas*, 517 U.S. 314, 322 (1996) (citations omitted). Although the President does not argue that this Court lacks the power to determine whether he generally has *legal* authority to detain persons such as respondent, he does argue that the courts may not inquire into the propriety of such detention in any particular case. *See supra* pp. 14-15. In other words, according to the government, once the determination were made by this Court that the President has authority to designate individuals as unlawful combatants, there could be no future court cases in which his exercise of that authority could be questioned.[14]

The President does not have the unilateral authority to suspend habeas corpus. The clearest signal that congressional authorization would be needed to bar an individual from seeking review of his detention in the civil courts is the constitutional assignment of the authority to suspend the privilege of the writ of habeas corpus to Congress. *See* U.S. Const. art. I, § 9, cl. 2. Indeed, by recognizing the possibility that Congress might suspend habeas corpus in a case of "Rebellion" (*id.*), the Framers anticipated the possible presence on U.S. soil of U.S. citizens who might be "enemy combatants," and yet they made clear that the authority to keep such persons outside the civil courts rests with Congress, not the Executive.

In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), this Court considered a petition for a writ of habeas corpus by two alleged co-conspirators of Aaron Burr. In considering whether the writ of habeas corpus had been suspended, the Court—answering no—observed that "it is for the legislature to say" whether "the public safety should require the suspension of the powers vested by this act in the courts of the United States." *Id.* at 101. Later, in *Brown* v. *United States*, 12 U.S. (8 Cranch) 110 (1814), this Court considered whether the government could condemn British property

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[14] The government has not disputed that, in this particular case, the courts may resolve whether the President has power under the Commander-in-Chief Clause of Article II to detain individuals as enemy combatants. *Cf. Quirin*, 317 U.S. at 25 (exercising jurisdiction to decide on the merits whether military tribunal had jurisdiction over saboteurs). But according to the government, that is the limit of judicial power in cases such as this, and the courts would have no warrant to determine in any particular case whether the President's Article II authority was properly exercised. Thus, under the government's theory, even if the President seized an individual without any reasonable justification, the courts could not second-guess the President's *military* determination that that person was an "enemy combatant" beyond (at most) inquiring whether it was supported by "some evidence," such as (as in this case) a sealed affidavit that the detainee could not probe or refute. *See supra* pp. 14-15.

captured as a result of an embargo authorized by Congress during the War of 1812. The Court concluded that, even in time of declared war, the right "to take the persons and confiscate the property of the enemy" was an "independent substantive power" of Congress, not the Executive. *Id.* at 122, 126.

The importance of the legislature's role in exerting such extraordinary control over individuals was further emphasized by this Court in *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849). There, this Court declined to overturn the imposition of martial law in Rhode Island, but the Court was careful to note that the state legislature had declared martial law. *Id.* at 45-46. The Court distinguished the case before it from commissions issued by the kings of England to proceed "without the concurrence or authority of Parliament." *Id.* at 46.

Ex parte Milligan was, as this case is, about the Executive Branch's claim to a power, without congressional authorization, to subject an individual who was not a member of the armed forces of a hostile state to military rather than civilian control. In *Milligan*, the Court ruled that the military commission that convicted Milligan of assisting the Confederacy was unlawful, and that Milligan was thus entitled to the writ of habeas corpus (unless, presumably, the government proceeded to bring charges against him in civil court). 71 U.S. (4 Wall.) at 130-131. The Court's unanimous conclusion was that, at a minimum, legislative authorization would be required for such a military commission to be valid, and that at least absent congressional authorization, "*[a]ll ... persons*, citizens of states where the courts are open" other than persons "attached to the army, or navy, or militia in actual service ... are guaranteed the inestimable privilege of trial by jury" rather than detention and trial by military tribunal. *Id.* at 123; *see also id.* at 137 (Chase, C.J., concurring) (stressing that Congress had made no such authorization).

These cases are not aberrations. As stated in the opinion in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), which rebuked President Lincoln's unilateral attempt to suspend the writ of habeas corpus during the Civil War, "I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion ... that the privilege of the writ could not be suspended, except by act of congress." *Id.* at 148; *see also Ex parte Benedict*, 3 F. Cas. 159, 165 (N.D.N.Y. 1862) (No. 1292) ("[T]he power of suspension is a legislative and not an executive power, and must be exercised, or its exercise authorized, by congress."); *Johnson* v. *Duncan*, 3 Mart. (o.s.) 530, 533 (La. 1815) ("The proclamation of Martial Law ... if intended to suspend the functions of this Court or its members, is an attempt to exercise powers thus exclusively vested in the Legislature."). Thus, since this country's inception, courts have recognized the need for legislative authorization for the power to bar individuals from seeking review of the basis for their detention in civil courts.

C. Military Detention Without Recourse To Civil Courts Requires An Emergency In Which The Civil Courts Cannot Operate

The government's claim fails for yet another reason: indefinite military detention of an individual apprehended in the United States, which has the effect of barring the detained individual from recourse to the civil courts to challenge the basis of his detention, could be justified—if at all—only to the extent that an actual and ongoing emergency is preventing legitimate civil authorities in the relevant geographic area from functioning. Even Congress may suspend habeas corpus only "when in Cases of Rebellion or Invasion the public safety may require it." U.S. Const. art. I, § 9, cl. 2. And when federal military force has been deployed within the United States with legislative authorization, it has been so deployed for the purpose of restoring legitimate civil authority.[15]

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[15] For example, when Congress authorized the use of force during the Civil War to suppress the Confederacy and then instituted temporary military administrations in the Southern States during Reconstruction, it did so because the prior civil authorities had unlawfully rebelled against the Union and no legitimate civil governments had been established to replace them. Moreover, Congress intended the military administrations

Most directly, in *Milligan*, a majority of this Court held that the power to cause the military to try (and, therefore, to detain) a U.S. citizen could be justified only in the case of a "necessity" that must be "actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." 71 U.S. (4 Wall.) at 127. Moreover, the Court made clear, "[a]s necessity creates the rule, so it limits its duration" and scope, for "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction" or outside "the locality of actual war." *Id.*

Milligan had strong roots in Anglo-American law. The principle that military control of individuals who are not members of a hostile army can be justified, if at all, only by an actual and ongoing emergency dates at least to the debates in Parliament in 1628 over the Petition of Right. There, a careful distinction was made between "'an enemy com[ing] into any part where the common law cannot be executed,'" in which case martial law was justifiable as a matter of necessity to maintain order, and the "'tak[ing] of a subject in rebellion,'" for which the subject "if he be not slain at the time of his rebellion" was to be "'tried afterwards and by the common law.'" *Ex parte McDonald*, 143 P. 947, 951 (Mont. 1914) (quoting the views of "such high authorities as Rolle and Coke" as stated by Rolle).[16]

Decisions from the early days of the Republic also demonstrate adherence to the critical distinction between the lawful use of military force to repel invasions and to suppress rebellions and unlawful attempts by the military to mete out punishment afterwards (thus exercising military control over individuals long after the emergency had passed). Individuals subjected to illegal military trials could hold the responsible military officials answerable in tort. *See, e.g., Smith* v. *Shaw*, 12 Johns. 257 (N.Y. Sup. Ct. 1815) (affirming award of damages against military officer who ratified and affirmed the acts of subordinate military officers who subjected plaintiff to an unauthorized court-martial during the War of 1812); *see also In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813) (Kent, C.J.) (issuing writ of habeas corpus in wartime against a military commander holding a civilian charged with treason in absence of authority of military to detain him). As the court in *Smith* held, a United States citizen would have been "amenable to the civil authority" if the government believed him to have committed treason, but he "could not be punished, under martial law, as a spy." 12 Johns. at 265.

Against this background of hostility to interference by the Executive with the civilian administration of justice, *Ex parte Merryman* considered and rejected an Executive attempt to claim a similar power to the one the government claims here. With the civil authorities operating, the opinion in *Merryman* refused to find "imprisonment by executive authority" justifiable. 17 F. Cas. at 150. In fact, that opinion confirmed that the purported authorization for Merryman's military detention went "far beyond the mere suspension of the privilege of the writ of habeas corpus" and illegally "thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers." *Id.* at 152. With the civilian courts open and in the absence of "danger of any obstruction or resistance to the action of the civil authorities," *Merryman* concluded that there was "no reason whatever for the interposition of the military." *Id.*

Thus, by the time *Milligan* was decided, the proposition that "[a]*ll . . . persons*, citizens of states where the courts are

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to assist in the restoration of legitimate civil governments in the formerly rebellious States. *See Texas* v. *White*, 74 U.S. (7 Wall.) 700, 730-731 (1869), *overruled on other grounds*, *Morgan* v. *United States*, 113 U.S. 476 (1885).

[16] *See also Merryman*, 17 F. Cas. at 150 (rejecting the proposition that "in framing a government intended to guard still more efficiently the rights and liberties of the citizen, against executive encroachment and oppression, [the framers of the Constitution] would have conferred on the president a power which the history of England had proved to be dangerous and oppressive in the hands of the crown; and which the people of England had compelled it to surrender, after a long and obstinate struggle on the part of the English executive to usurp and retain it").

open" other than persons "attached to the army, or navy, or militia in actual service ... are guaranteed the inestimable privilege of trial by jury," 71 U.S. (4 Wall.) at 123, rather than detention and possible trial by the military was already well-established.[17] Although the Court recognized in *Quirin* that other persons subject to military jurisdiction under the well-settled law of war might be subjected to military control, including a U.S. citizen *if* he had joined the armed forces of a hostile state, it made no further inroads on the principle of *Milligan*.

Moyer v. *Peabody*, 212 U.S. 78 (1909), does not support the government's position (Pet. Br. 39) that, because the military may use force on certain persons, military detention of indefinite length—whether or not followed by military trials—is a "milder" measure. *Moyer* involved a temporary detainee's *post-release* civil claim for damages based on wrongful imprisonment. The issue addressed by this Court was not whether the plaintiff's detention violated his constitutional rights; indeed, the Court "assume[d]" that the governor lacked "sufficient reason" to detain the plaintiff in the course of putting the insurrection down. 212 U.S. at 84. The issue, rather, was whether the violation had been sufficiently obvious and serious to justify an award of civil damages. *See id.* at 85 (suggesting that a detention longer than reasonably necessary would make an award of damages possible).

[17] The rule of *Milligan*—that citizens cannot lawfully be detained by the military any longer than necessary to restore order and may not be tried by military tribunals when the courts are open, at least in the absence of explicit legislative authorization—was sufficiently well-established by the early twentieth century that the Montana Supreme Court, confronted with a gubernatorial attempt to suspend the writ of habeas corpus and authorize military tribunals at the state level, noted that the rule was the clear "result of the adjudicated cases arising under the national Constitution," so much so that "[i]t would extend this opinion to inordinate length to review them all ...." *McDonald*, 143 P. at 952; *see also Sterling* v. *Constantin*, 287 U.S. 378, 402-403 (1932) (injunction appropriate against enforcement of governor's order limiting private citizens' production of oil, observing that judicial procedure was available and that the courts were "open and functioning."); Wiener, *supra*, at 59 ("Not since the Civil War have federal troops called out in aid of the civil power tried civilians not normally subject to military law by military tribunals.").

Moyer was in essence a decision about what would later be described as Executive officials' qualified immunity from personal liability for their official actions. *Cf. Scheuer* v. *Rhodes*, 416 U.S. 232, 247-248 (1974) (concluding that executive officers may be held personally liable under 42 U.S.C. § 1983 for constitutional torts, although only for actions that were objectively unreasonable in light of the facts as they appeared at the time) (discussing *Moyer*).

In affirming the dismissal of the civil action in *Moyer*, the Court was careful to note that the governor, having "declared a county to be in a state of insurrection" and "called out troops to put down the trouble," "ordered that the plaintiff should be arrested as a leader of the outbreak, and should be detained until he could be discharged with safety, and that then he should be delivered *to the civil authorities, to be dealt with according to law.*" 212 U.S. at 82-83 (emphasis added). *Moyer* thus supports the uncontroversial proposition that the government may use force to suppress unlawful rebellions against legitimate civil authority and may, as part of that power, temporarily detain persons until civil authorities are able to function. But *Moyer* does not fairly suggest that the Executive power includes the power to detain citizens indefinitely or to cause them to be tried by military tribunals when the civilian courts are functioning.

Moreover, the detention of the plaintiff in *Moyer* was relatively brief, a fact that this Court appears to have accorded considerable significance. The short duration of the detention provided little basis upon which to question the reasonableness of the governor's judgment—for purposes of assessing his personal liability—that his actions were truly made necessary by the need to preserve order in the face of an ongoing collapse of legitimate civil government. The Court nevertheless noted the possibility of a future case "in which the length of the imprisonment would raise a different question." 212 U.S. at 85.

The instant case is the case that the Court hypothesized in *Moyer*. Padilla has been detained for nearly two years, and the government denies any obligation to deliver him to the civilian authorities for trial. Yet there is no question

that the courts are open and functioning—as demonstrated by Padilla's initial arrest and detention pursuant to a material witness warrant. At least in the absence of explicit congressional authorization and a pressing emergency preventing the civil courts from operating, therefore, there is no lawful basis for military detention of one such as Padilla, who does not fall within one of the well-settled categories of persons subject to military jurisdiction.

* * * * *

To hold that the rule of law does not apply to any person within the United States—to hold that he may be withdrawn from the purview and protection of the Nation's civil authorities and subjected to the untrammeled military will of the President—is a dramatic thing indeed. Whether that might be constitutional in time of dire emergency, when Congress could not make arrangements for the effective civil government of the Nation, is fortunately not a matter that the Court need consider today. Our civil institutions are safe and well-functioning, and Congress has made no provision for the supplanting of the civil courts by military rule for one such as respondent, who does not fall within one of the well-settled categories of persons to whom "the law of war"—i.e., military authority—may be applied, rather than the exercise of reasoned judgment that is the currency of our judicial system.

At present our armed forces are overseas pursuant to Congress's and the President's determination that their deployment abroad is necessary to the security of the Nation. The unimpaired operation of our civil governmental institutions at home, including the courts, is an essential part of the very national security that our military has been called out to safeguard. The government, though understandably concerned about public safety, seems to have lost sight of this deeper point. According to the government, the President may, when he determines it to be appropriate, subject an individual to the unreviewable control of the military, without any charge or need to show that the detainee has violated any law, and without any process by which the detainee may show that he has been erroneously and improperly detained. The power that the President claims is not faithful to our constitutional values or traditions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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